EFFICIENCY'S THREAT TO THE VALUE OF ACCESSIBLE COURTS FOR MINORITIES

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Introduction

Former Supreme Court Justice Goldberg admonished the *Korematsu* legal team: give it up; filing is ill-advised; you haven't a chance.[1] He made sense. Forty years earlier, the Supreme Court decided the notorious *Korematsu* case with seeming finality.[2] The Court upheld the constitutionality of the internment without charges or trial of 110,000 innocent persons of Japanese ancestry on the west coast during World War II. Although sharp criticism followed, the decision stood as a judicial landmark. What chance did this group of young volunteer attorneys have in 1983 of persuading a federal district court, first, to vacate Fred Korematsu's 1942 conviction for refusing to abide by the military's "civilian exclusion" orders and, second, to lessen the continuing stigma of the internment through judicial declaration?[3]

The legal team pressed forward, fueled by the discovery of a cache of Justice and War Department documents revealing that the government deliberately suppressed evidence and misled the Supreme Court about military necessity when the Court considered *Korematsu* in 1944.[4] The legal team employed a

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[1] Interviews with Dale Minami, lead counsel for the *Korematsu* legal team (June 26, 1989 and Sept. 16, 1989).

[2] Korematsu v. United States, 323 U.S. 214 (1944).

[3] *See* P. Irons, Justice Long Overdue (1988).

[4] *See* P. Irons, Justice at War (1983); Yamamoto, Korematsu *Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 Santa Clara L. Rev. 1 (1986) [hereinafter Yamamoto, Korematsu *Revisited*]. I was a member of the *Korematsu* legal team that litigated the *coram nobis* proceeding.

rarely used legal vehicle. It filed a petition for a writ of error *coram nobis* in January, 1983 seeking to set aside Korematsu's conviction in light of the government's extreme misconduct in falsely justifying the internment.[5] With strong community support, the team raised over $60,000 to pay for litigation costs. The attorneys, most working in small firms and most the children of parents who had been interned, collectively volunteered over $350,000 in litigation time.

The Justice Department defended vigorously. After considerable procedural skirmishing, Korematsu prevailed. The district court granted his petition on the merits and vacated his conviction. Judge Patel of the United States District Court for the Northern District of California found "manifest injustice." She issued an opinion castigating high level government officials in the Justice and War Departments for misleading the Supreme Court by suppressing critical evidence.[6] Other legal teams achieved similar results in the reopening of *Hirabayashi v. United States*[7] and *Yasui v. United States*.[8] These decisions were cathartic for many former internees.

The three *coram nobis* cases, along with a congressional commission's 1983 report on the internment,[9] provided the essential impetus for recent government approval of $1.2 billion in reparations to former internees. Political history has been rewritten, the judicial system has addressed its own failings, and America has finally begun to place behind it a tragic episode in its constitutional history.[10]

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[5] A writ of *coram nobis* is an extraordinary writ that operates to correct fundamental errors or to prevent manifest injustice in criminal proceedings. 28 U.S.C. § 1651 (1970). *See, e.g.*, United States v. Morgan, 346 U.S. 502 (1954) (holding federal district court could issue writ of *coram nobis* to challenge prior conviction when defendant had not been provided with trial counsel). The writ, like its relative, the writ of habeas corpus, is civil in nature, and is governed by rules of civil procedure. *See generally* Yamamoto, Korematsu *Revisited*, *supra* note 4, at 2 n.6.

[6] Korematsu v. United States, 584 F. Supp. 1406, 1410 (N.D. Cal. 1984).

[7] 828 F.2d 591 (9th Cir. 1987) (reopening Hirabayashi v. United States, 320 U.S. 81 (1943)).

[8] 772 F.2d 1496 (9th Cir. 1985) (reopening Yasui v. United States, 320 U.S. 115 (1943)). *See* Yamamoto, Korematsu *Revisited*, *supra* note 4, at 19.

[9] Report of the Congressional Commission on Wartime Relocation and Internment of Civilians ("CWRIC"), Personal Justice Denied (1983), discussed *infra* note 381.

[10] *See* Irons, Justice Long Overdue, *supra* note 3.

But would Korematsu and the legal team have filed the *coram nobis* petition if such litigation posed risks beyond the stigma of losing and the commitment of countless hours of volunteer time? What if a clear loss, as initially predicted by former Justice Goldberg, also meant that Korematsu and his lawyers would have to pay $200,000 in attorneys' fees as a sanction? Could they have afforded to litigate boldly? Could they have afforded to litigate at all? What if a court-annexed arbitration program had shunted the dispute to private disposition by an arbitrator without the benefit of discovery, without the openness and formality of litigation, and without the potential for a public decision? Ultimately, would the considerable value of Korematsu's public adjudication have been undercut by a more efficient dispute resolution system? Recent efficiency reforms in federal civil procedure raise such pressing questions. How those reforms serve or disserve values of court access for minorities is the subject of this Article.

The Supreme Court's recent pronouncements on affirmative action,[11] racial harassment,[12] employment discrimination,[13] municipal civil rights immunity[14] and the execution of retarded people[15] signal an aggressive and broad retreat from minority

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[11] City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (applying strict scrutiny standard of review to city's minority contractor set-aside ordinance and holding that a generalized finding of discrimination in the entire construction industry cannot justify minority racial quota).

[12] Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (declaring racial harassment in employment is not actionable under 42 U.S.C. § 1981).

[13] Wards Cove Packing Co. v. Atonio, 110 S. Ct. 38 (1989) (ruling that Title VII plaintiff bears both the burden of proving disparate impact and the burden of disproving the employer's assertion that the adverse employment practice was based solely on a legitimate neutral consideration); Lorance v. A.T.& T. Technologies, 109 S. Ct. 2261 (1989) (affirming dismissal of female employees' Title VII claim through a restrictive interpretation of the statute of limitations period for challenging discriminatory seniority systems).

[14] Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989) (expanding scope of municipal civil rights immunity).

[15] Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (holding eighth amendment does not categorically forbid execution of mentally retarded); *see also* Stanford v. Kentucky, 109 S. Ct. 2969 (1989) (holding eighth amendment does not forbid the death penalty for minors age 16 or older).

liberties.[16] A maelstrom of public praise and criticism swirls around the Court's decisions about rights.[17]

Far less obvious, and generating far less resistance, has been a gradual retooling of procedural rules in the name of systemic efficiency. Efficiency reforms compel private dispute resolution of "alternative" cases, discourage marginal litigants through punitive sanctions, require more factual support before filing, shrink the postfiling information-gathering process and erect tougher obstacles to juries. They have pared down the system of public adjudication.[18] Cheaper and quicker resolutions appear to have benefitted the system and some participants.[19]

But serious problems have emerged. First, various indicators suggest that recent federal procedural reforms have subtly

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[16] *See Rehnquist Court Restricting Constitutional Protections*, L.A. Times, Feb. 24, 1989, § 1, at 12, col. 1; *Now, the Court of Less Resort*, U.S. News & World Rep., July 17, 1989, at 26; *Chipping Away at Civil Rights*, Time, June 26, 1989, at 63; *Affirmative Inaction*, 48 Pol'y Rev. 32 (Spr. 1989).

Other recent decisions include Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (affirming Roe v. Wade, 410 U.S. 113 (1973), but expanding scope of state regulation of abortion funding); Skinner v. Railway Labor Executives' Assoc., 109 S. Ct. 1402 (1989) (upholding program of mandatory drug testing of railroad employees). *But see* Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (remanding a sexual discrimination claim and requiring employer to prove nondiscriminatory justification). *See* N. Amaker, Civil Rights and the Reagan Administration (1988) (finding the Reagan administration's civil rights enforcement record weaker than the record of all six predecessors and documenting opposition to affirmative action and civil liberties initiatives in housing, employment, education and federally assisted programs); H. Schwartz, Packing the Courts—The Conservative Campaign to Rewrite the Constitution (1988); Caplan, *The Tenth Justice*, New Yorker, Aug. 10, 1987, at 29.

[17] Media response has been varied and pointed. *See, e.g.*, *The Court is Right to Stop Pampering Minorities*, Newsday, July 3, 1989, at 41; *Put the Brakes On Prejudice*, Newsday (Nassau and Suffolk ed.), July 13, 1989, at 77; *Illogical Force: Supreme Court's Civil Rights Decisions*, The Nation, July 10, 1989, at 40. Scholarly writings about rights are numerous. *See infra* notes 288–303 and accompanying text.

[18] *See infra* notes 41–199 and accompanying text for a thorough discussion of efficiency reforms.

[19] I agree generally with critics of litigation who see some aspects of the system as generating excessive cost. Unnecessary litigation cost works as leverage against those with limited resources and thus distorts outcomes. Recent reforms aimed at making the cost of discovery proportionate to the needs of cases and the resources of parties generally are positive steps. *E.g.*, Fed. R. Civ. P. 26(b)(1). I also agree with critics who believe the federal litigation system, in its recent past, has sometimes tolerated utterly careless and abusive filings, that is, those that were not at all thoughtfully conceived or that were vindictively filed with a desire only to harass. Such filings hurt innocent parties, drain judicial resources, and diminish public confidence in the legal system. Procedural reforms specifically designed and carefully implemented to deter such misfilings, and only such misfilings, are justifiable. My concern is that recent efficiency reforms have not been carefully tailored to specific problems and collectively go far beyond these justifiable limits.

yet measurably discouraged judicial access for those outside the political and cultural mainstream, particularly those challenging accepted legal principles and social norms.[20] The reforms assume and facilitate a procedural system hospitable to litigants with disputes involving well-settled legal principles. Efficiency reforms make expendable those raising difficult and often tenuous claims that demand the reordering of established political, economic and social arrangements, that is, those at the system's and society's margins. Had efficiency reforms been firmly in place in 1983, they would have deterred the *Korematsu* legal team from timely initiating and forcefully litigating the *coram nobis* proceeding.[21]

Second, formalist notions of efficiency, neutrality and fairness have obscured the cumulative effects and attendant value judgments of procedural reforms. While the Court's retreat in civil liberties captures public attention and spurs often rancorous debate, the procedural revolution that is diminishing court access continues in comparative quiet.

Public scrutiny is essential. Reforms that discourage court access for minorities asserting "marginal" rights claims reflect value judgments about the purposes of adjudication and the desirability of broad-based participation in the litigation process.[22] Should procedure discourage adjudication of challenges to the "unconscious racism" that may underlie "the racially disproportionate impact of governmental policy";[23] to the un-

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[20] *See infra* notes 86–199 and accompanying text.

[21] Minami stated in a recent interview that a risk of Rule 11 sanctions, buttressed by horror stories such as the Christic Institute debacle, *see infra* note 139, or a requirement of proceeding first through private arbitration, would seriously have altered the legal team's approach to the litigation and may even have affected its decision to file. *See infra* note 335. The *Korematsu* petition was filed shortly before the institution of these reforms. Minami stated that, at a minimum, a colorable risk of sanctions would have delayed filing for a year while the volunteers conducted more research and the legal team awaited the report of the congressional commission investigating the internment. The delay, he indicated, would have created severe organizational difficulties for the litigation team which at any given time was attempting to coordinate the efforts and sustain the commitment of 50 or more volunteer students and community persons. He also stated that the one traditional law firm that provided substantial logistical support for the legal team might have been deterred from providing that essential support if sanctions had been a risk. *Id.*

[22] *See infra* notes 200–246 and accompanying text.

[23] Lawrence, *Ego, Id and Equal Protection: Reckoning With Unconscious Racism*, 39 Stan. L. Rev. 317, 355 (1987) [hereinafter Lawrence, *Unconscious Racism*] (suggesting replacement of the "intent" test for unlawful discrimination with a "cultural

stated assumption of women's "natural" inferiority in the business arena that justifies their continued exclusion from high executive positions;[24] to the belief in the immorality and aberrance of homosexual relationships that justifies government regulation of private matters not otherwise regulable for heterosexuals;[25] and to the idea that the first amendment unqualifiedly protects racist hate speech?[26] Today, these challenges are on the margins of prevailing law. They are not, however, marginal in social importance.

Consider *Fragante v. City and County of Honolulu*.[27] Manuel Fragante is a Filipino American who, as an adult in 1981, emigrated from the Philippines to Hawaii. At the time that he emigrated, he spoke English grammatically and coherently, but with a strong accent.[28] After a year he took the civil service exam in English, scoring the highest of 721 test-takers. He applied for an entry-level clerical position with the City of Honolulu's Division of Motor Vehicles. Fragante was ranked first among the short list of eligible candidates. The assistant licensing administrator and the division secretary then conducted a fifteen-minute interview, following no set procedures. The interviewers noted Frangante's "very pronounced accent which is difficult to understand."[29] Although the administrator was

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meaning" test that "would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance . . . ." *Id.* at 356).

[24] Perhaps the most notable historical example is the challenge to the "natural" law of social segregation between races that justified the separate-but-equal principle. *See infra* notes 336–343 and accompanying text.

[25] *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986) (challenging the constitutionality of Georgia statute criminalizing sodomy).

[26] *See* Borovoy, Mahoney, Brown, Cameron, Goldberger & Matsuda, *The James McCormick Mitchell Lecture—Language As Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 Buffalo L. Rev. 337 (1988–89); Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) (calling for a tort remedy for racist words); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) (calling for public sanctions as a response to racist speech).

[27] No. 87-2921 (March 6, 1989), *modified*, 888 F.2d 591 (9th Cir. 1989), *cert. denied*, ___ U.S. ___ (1990).

[28] Fragante's education in the Philippines, including a bachelor of law degree, was in English. He served an extended term in the military, which included several trips to the United States, and worked in the private sector as a salesman. In both situations, English was the primary language spoken. *See infra* note 30.

[29] These facts are uncontroverted. *See Fragante*, 699 F. Supp. 1429, 1431 (D. Haw. 1987); Appellant's Opening Brief; Appellees' Answering Brief; Appellant's Reply Brief; Appellant's Petition for Rehearing.

impressed with Fragante's educational and employment history and although Fragante possessed "extensive verbal communication skill in English,"[30] the administrator did not recommend hiring Fragante because of his accent. Was this, as asserted by the city administration, a situation of an applicant failing to meet a crucial job requirement?

An examination of the social context suggests a deeper problem. Viewed as a cultural group, Filipinos in Hawaii struggle economically and socially.[31] Filipino immigrants speak English with a heavy accent that is sometimes mocked.[32] Although some have achieved positions of prominence, Filipinos are underrepresented in civil service government jobs, appointed government positions, and public school teaching.[33] Moreover, stereotypes of the socially unstable and violent-tempered immigrant Filipino male persist.[34] In this context, Fragante's problem with city administrators may be viewed as part of a larger problem of cultural bias underlying government hiring practices and policies. As evidenced by the administrators' written statement, they did not reject Fragante because he was unable to communicate or because he was unqualified. Instead, they "would not recommend him . . . because of his accent."[35]

Fragante believed that he was rejected for two reasons. First and foremost, he claimed that the interviewers were discomforted by his Filipino accent and thought the public would feel similarly. Fragante viewed his rejection as a manifestation of "unconscious racism."[36] Second, he asserted that interview

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[30] *Fragante*, 699 F. Supp. at 1431.

[31] East-West Population Inst., Filipino Immigrants in Hawaii: A Profile of Recent Arrivals 4, 5 (July 1985).

[32] The only linguist at Fragante's trial testified to this. *See* Appellant's Opening Brief, *supra* note 29, at 12.

[33] *Id.*

[34] This stereotype appears to have been revived to an extent by recent media reports of the emergence of Filipino youth gangs in Hawaii. *See Hawaii Youth Gangs a Growing Problem*, Honolulu Advertiser, Feb. 3, 1989, at A4, col. 2; *Filipino Gangs A Complex Problem, Conference Told*, Honolulu Advertiser, Aug. 12, 1988, at A7, col. 1.

[35] *Fragante*, 699 F. Supp. at 1431. In late 1983, Fragante accepted employment as a statistics clerk at the State of Hawaii Department of Labor. His job required that he conduct surveys and gather information, often over the telephone or through conversations with members of the public. He has continued to work with the Department of Labor and has been promoted three times. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, at 5 n.2 (Feb. 1990).

[36] Interview with Fragante (Aug. 24, 1989).

procedures fostered biased decisions.[37] Fragante's administrative protest was unavailing.[38] Therefore, he had two options: grin and bear it, or file suit.

Factual and legal hurdles made Fragante's case a difficult one in terms of obtaining a favorable judgment. How could he prove that city administrators denied his application because they believed his accent would be unacceptable to the mainstream public, that is, that he was rejected because the public would not want to listen? Title VII prohibits discrimination on the basis of national origin and some courts recognize accent discrimination to be illegal on that basis. Courts, however, also recognize the "ability to communicate" as a "bona fide occupational qualification."[39]

To succeed, Fragante needed to adopt a legal position based on a reordering of social understandings. In doing so, he maintained that while listener inability to understand his speech would justify a refusal to hire, listener preference to hear a familiar accent would not. Fragante's theory was a novel one. No court had formally recognized it. It embraced an alternative view of social reality: that mainstream speech preferences may unjustly define what is "natural" in social interactions.

Are marginal claims such as Fragante's discouraged by recent efficiency procedural reforms? Should they be? To address these questions, Part I of this Article examines recent reforms at each stage of the litigation process. Part II describes a framework of traditional procedural values for evaluating efficiency procedural reforms. That framework reveals troublesome aspects of the reforms collectively and indicates that single-value efficiency analysis used to justify the reforms is incomplete.

Parts III and IV suggest that traditional values analysis is itself incomplete. Traditional values analysis tends to focus nar-

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[37] Fragante's trial expert on industrial relations testified that the city's interview rating form was the worst that he had seen in 35 years. Appellant's Opening Brief, *supra* note 29, at 36. The district court confirmed the "insufficiencies of the rating system and the weaknesses of the interview process," but, somewhat illogically, found no discriminatory application in Fragante's situation. 699 F. Supp. at 1432.

[38] Fragante's complaint to the State Department of Labor was rejected after a brief investigation. Appellant's Opening Brief, *supra* note 29, at 5.

[39] EEOC Comp. Man. (CCH) ¶ 4035 (1986); *see also* Mejia v. New York Sheraton Hotel, 459 F. Supp. 375, 377 (S.D.N.Y. 1978) (discharge of hotel employee for lack of English skills held nondiscriminatory).

rowly on the individual litigant, assume a separation of procedure and substance, accept the essential fairness of facially neutral procedures, and embrace a primarily private dispute-resolution purpose of adjudication. This Article offers in its place a reformulated values framework that better accounts for minority interests in court access, particularly for those minorities challenging social understandings that inform prevailing law. The reformulated values framework draws upon traditional values analysis as well as recent developments in rights and feminist theories. It acknowledges differential power in group relations, rejects a clean divide between substance and procedure, dispels the myth of a value-free procedural science, and recognizes the importance of public values articulation as a function of adjudication. Measured against this values framework, efficiency reforms can be seen as threatening significant aspects of our adjudicatory system as well as our system of democratic governance.

Part V locates the Article's ideas about procedure amidst the larger debate about rights. It acknowledges criticisms about rights litigation and rights discourse along with concerns about "legal utopianism." It nonetheless finds enduring value in accessible courts for minorities asserting rights as potentially part of a dynamic process of cultural transformation. Court access is potential leverage for those without established power or social status to "assemble, associate and articulate positions politically on the terrain of civil society," and to thereby participate in the debate over "legal and political choices without pretending a social harmony that does not exist and without foreclosing social changes as yet unimagined."[40]

I. Recent Efficiency Procedural Reforms that Diminish Minority Access to Courts

Commencing in the mid-1970's, and supported by former Chief Justice Burger's complaints about an overburdened judiciary,[41] judges, lawyers and scholars leveled vociferous criticism

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[40] Cohen, *Morality or Sittichkeit: Toward a Post-Hegelian Solution*, 10 Cardozo L. Rev. 1384, 1406 (1989).

[41] Burger, *Introduction to Symposium: Reducing the Costs of Civil Litigation*, 37 Rutgers L. Rev. 217 (1985).

at the civil litigation system in the United States.[42] Much of the criticism focused on overcrowded dockets, excessive cost, delay, waste and insensitivity to human needs. Scholarly criticism also pointed to failures of the adversary system, including flawed procedures that encouraged frivolous filings, runaway discovery, and begrudgingly authorized pretrial judicial management of cases.[43]

The perceived flood of "public law" cases commencing in the late 1960's seemingly exacerbated these problems.[44] "Litigation explosion" and "hyperlexis" surfaced as descriptive terms simultaneous with criticism of excessive congressional and judicial zeal in creating new rights.[45]

Cries for procedural reform emanated from many camps, coalescing disparate interest groups. The rallying point—efficiency. Judges wanted fewer, shorter, and less complicated cases.[46] Plaintiffs' attorneys, including some public interest law groups, wanted less obstructionism by better-heeled defense counsel.[47] Defense counsel wanted fewer frivolous plaintiffs'

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[42] Levin & Colliers, *Containing the Cost of Litigation*, 37 Rutgers L. Rev. 219 (1985); Manning, *Hyperlexis: Our National Disease*, 71 Nw. U.L. Rev. 767 (1977); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn. L. Rev. 1 (1984); Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Calif. L. Rev. 770 (1981) [hereinafter, Peckham, *Judge as Case Manager*]; Sarat, *The Litigation Explosion, Access to Justice and Court Reform: Examining the Critical Assumptions*, 37 Rutgers L. Rev. 319 (1985). *But see* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983) [hereinafter Galanter, *Landscape*].

[43] *See* Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge In Civil Litigation*, 9 U. Haw. L. Rev. 395, 398 (1987) [hereinafter Yamamoto, *Case Management*].

[44] *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) [hereinafter Chayes, *Role of the Judge*] (discussing the emergence of public law litigation as a mode of adjudication).

[45] Marc Galanter's studies of the "litigation explosion" conclude that this rhetoric distorted the actual picture. A notable part of the increase in filings was attributable to government debt collection actions. Many of the supposedly systemwide problems were evident only in the small percentage of cases that were complex. Much of the criticism did not address the vast majority of "ordinary" cases. Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3 (1986) [hereinafter, Galanter, *Day After*]; *see* Galanter, *Landscape*, *supra* note 42.

[46] *See, e.g.*, Peckham, *Judge as Case Manager*, *supra* note 42.

[47] *See generally* Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand. L. Rev. 1295 (1978) (exploring the thesis that the adversary character of civil discovery promotes pratices which systematically impede the principal purpose of discovery, that is, revelation of all relevant facts).

filings. Political conservatives wanted less public interest litigation.[48] The Supreme Court wanted to curb abusive discovery practices.[49] Congress and a weary public wanted changes that made litigation cheaper and more responsive to litigant needs. In response to this "failing faith" in the courts,[50] federal and state court research centers and the American Bar Association recommended procedural changes to "reduce cost and delay."[51]

As a result of this reform fervor, mediation and court-annexed arbitration programs were established, removing a vast array of legal disputes from the litigation system and reducing costs for participants and courts. Greater managerial authority was invested in judges, enabling them to control entry into the system as well as pretrial development of cases.[52] At the prefiling stage, amended Rule 11 now requires rigorous attorney screening of claims, defenses, and motions.[53]

At the time of filing, judges require heightened fact-pleading for certain types of difficult and time-consuming cases. "Disfavored" substantive claims must pass a higher threshold for entry into the system.[54] After filing, judicial control over discovery endeavors to make the cost of information-gathering proportionate to the amount in controversy and the needs of the case.[55]

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[48] *See* R. Posner, The Federal Courts: Crisis and Reform (1985) [hereinafter Posner, Federal Courts] (proposing limitations on judicial scrutiny of public and private bureaucratic institutions); L. Tribe, Constitutional Choices (1985) (describing lobbying by conservative political organizations to limit federal court subject matter jurisdiction in civil rights cases).

[49] *See Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521 (1980) (Powell, J., dissenting) (objecting to the adoption of the 1980 amendments to the Federal Rules because they did not go far enough toward curbing discovery abuse). *See generally* Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 Calif. L. Rev. 806 (1981) (analyzing the underlying premises of the dissenting opinion by Justice Powell and concluding that, given the lack of a workable proposal to limit the scope of discovery, the Supreme Court was wise to adopt the 1980 amendments).

[50] Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494 (1986).

[51] *See, e.g.*, ABA Action Comm'n to Reduce Court Costs and Delay, Attacking Litigation Costs and Delay 59 (1984); Hoffman, *Foreword* to Federal Judicial Center, Case Management and Court Management in United States District Courts at vii (1977); Yankelovich, Skelly & White, Inc., The Public's Image of Courts (Nat'l Center for State Courts 1978).

[52] *See* Peckham, *Judge as Case Manager*, *supra* note 42.

[53] *See infra* notes 96–142 and accompanying text.

[54] *See infra* notes 143–149 and accompanying text.

[55] *See* Yamamoto, *Case Management*, *supra* note 43, at 448–49.

Amidst discovery, reformulated summary judgment standards increase the utility of the motion for defendants.[56] As a result, more claims are dismissed before trial, lifting considerable burdens from defendants and courts.[57] These efficiency reforms at each stage of the litigation process reduce the cost of dispute resolution for many litigants and for the judicial system itself. They also shorten the average time of disposition and lighten court dockets.[58]

Greater efficiency, however, does not ensure that the legal process will be fairer or that the interests of all litigants will be equally considered. A growing body of evidence and commentary suggests two problems. First, efficiency reforms inhibit overall access to the courts. Not only are certain litigation processes truncated, but standards for entry into the system itself are more exacting. This heightening of standards is part of a design to shrink, or at least to retard, expansion of the system.

Second, public interest litigants and minorities in particular pay a high price for systemic efficiency.[59] As developed later in

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[56] *See infra* notes 150–167 and accompanying text.

[57] "Public demand for greater efficiency and economy, which is served by early disposition of baseless claims and defenses, is insistent and well-founded." Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984).

[58] *See, e.g.*, Planet, *Reducing Case Delay and the Costs of Civil Litigation: The Kentucky Economical Litigation Project*, 37 Rutgers L. Rev. 279 (1985) (study of case management in Kentucky courts).

[59] Speaking of "minorities" seems to imply a single viewpoint. There is, of course, no single minority viewpoint or minority group. *See* Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401, 404 n.4 (1987) (discussing the imprecise fit or inappropriateness of the terms "disenfranchised," "oppressed people," and "minority" with reference to African-Americans). The term minority, as often used, encompasses vastly differing groups with differing interests, experiences, and situations, including disparate ethnic groups, the disabled, and gay men and lesbians, among others. Sometimes women are considered a minority group. Each of these categorical groups is comprised of varying subgroups of intensely connected and sometimes conflicting interests and values. *See* Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L.J. 1287, 1299 (1982) [hereinafter Cover, *Judicial Activism*] (cautioning that "[t]o generalize to a 'minorities problem' suggests the *irrelevance* (or subordinate character) of any group's particular experience"); *see also* McCleskey v. Kemp, 481 U.S. 279, 316 n.39 (1987) (the majority is comprised of diverse and previously discriminated-against minorities). Individual members of any group also have their own experiences and views on affirmative action, discrimination, and social activism.

Whether a group is or is not a "minority" may depend on the perspective of mainstream society held by the person assigning the label. *See* Minow, *Foreword:*

this part, recent efficiency reforms discourage public interest, contingent fee, and pro bono attorneys from litigating on behalf of those outside the political and cultural mainstream who are challenging prevailing legal, political, and social norms.[60] An unacknowledged premise of reform seems to be that these "marginal" litigants are expendable.

No single group masterminded the reforms, nor was a single view of efficiency formally championed. Instead, three divergent theories provided foundational support for the reform movement's emphasis on reducing the public and private costs of litigating. Their common assumption was the necessary linkage

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Justice Engendered, 101 Harv. L. Rev. 10, 13 n.16 (1987) [hereinafter Minow, *Justice Engendered*] ("'minority' itself is a relative term" since minority implies difference that "is only meaningful as a comparison"). Labeling a group a minority may be as much an act of political expression as an act of description. For that reason, I like Martha Minow's use of "people of difference." It is descriptive of differences that exist but does not use a majority as the reference point. Since this Article addresses situations created by procedural reforms' apparent adoption of a mainstream referent, however, use of "minority" in its relational sense seems appropriate.

[60] *See infra* notes 107–109, 114, 139 and accompanying text. Acknowledging the problems of description and perspective recited in note 59, *supra*, and accepting them as context, I find it useful and necessary to draw upon traditional sociological and jurisprudential definitions of "minorities." My observations and comments should be construed accordingly, as generalizations about political and social relationships that may apply more to some groups or subgroups and less to others. The generalizations are intended to address groups linked by two common factors: groups that (1) have been stigmatized by mainstream society due to some characteristic of difference, e.g., skin color; and (2) lack immediate access to political power and opportunities for ready coalition-building meaningfully to exert influence on mainstream decisionmakers. *See* Ely, Democracy and Distrust (1983) (discussing and reconceptualizing the process defect theory of *Carolene Products*' footnote four); Lusky, *Minority Rights and the Public Interest*, 52 Yale L.J. 1, 2 (1942) (defining "minorities" as "'out-groups' disliked by those who control the political and other organs of power in society . . . because . . . the group is itself considered a cause for distrust or even hostility"); Wirth, *The Problem of Minority Groups*, in The Science of Man in the World Crisis 347 (R. Linton ed. 1945) (defining minorities as a group which tends to regard itself as a people apart, singled out from others in society for differential and unequal treatment and who therefore regard themselves as objects of collective discrimination). These factors, despite many other group differences, in part account for the minority labeling process and to a general extent create shared social and psychological context that permit general reference to "minorities." This definitional approach is appropriate to an evaluation of procedural reform that appears to embrace mainstream norms. For a critique of Ely's process defect theory, see Lawrence, *Unconscious Racism*, *supra* note 23, at 345–47. *But see* Cover, *Judicial Activism*, *supra* note 59, at 1299 (finding this "great intellectual step" in social psychology to be of "dubious validity"); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 445–46 (1985) (noting that criteria for defining minorities, such as immutable characteristics, lack of political power and vulnerability to prejudice are difficult to apply).

of efficiency with fairness. The three efficiency theories are summarized below, without attention to complexity or subtlety, to provide context for the subsequent analysis of specific reforms.

A. Theories of Efficiency

1. Utilitarianism

According to utility theory, the purpose of dispute resolution procedure is the maximization of social welfare. Costs of particular procedures are evaluated in light of general social benefits.[61] The Supreme Court's prevailing cost-benefit procedural due process analysis builds upon but modifies traditional utilitarian analysis. The Court views the purpose of procedure as enhancing the accurate application of substantive law.[62] Society necessarily benefits as a result. When choosing between procedures that enhance accuracy, "one calculates the costs of each and then uses the one with the lowest total cost."[63] Procedures that do not enhance accuracy, despite other benefits, are excluded from the calculus because they are inefficient by definition. The Court's due process formulation in *Mathews v. Eldridge*[64] thus focuses narrowly on the costs and benefits associated with the accuracy of applications of substantive law to facts. This concept of procedural efficiency has been roundly criticized. One major criticism is that it assumes an extremely narrow purpose of adjudication, ignoring other procedural val-

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[61] *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 46–49 (1976).

[62] *See id.* at 30.

[63] Bayles, *Principles for Legal Procedure*, 5 Law & Phil. 37, 44 (1986).

[64] 424 U.S. 319 (1976). The *Mathews* formulation requires consideration of:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requisites would entail.

Mashaw, *supra* note 61, at 30.

ues such as individual dignity and participation in the governmental process.[65]

2. *Law and Economics*

Law and economics theory champions economic efficiency.[66] It transforms into quantitative terms traditional utility theory's goal of promoting general social welfare. The law and economics goal is the maximization of individual preferences. These preferences are measured by wealth, which is maximized when market forces operate freely. The market, undistorted by governmental influence, should be the ultimate arbiter because it reflects the value that parties place on their positions.[67] Because market transactions entail costs of processing and correcting mistakes, both of which impede the operation of market forces, a goal of law and economics theory is the minimization of transaction and error costs.[68]

In the litigation context, the goal is the adoption of the least expensive procedure needed to replicate market results.[69] Legal procedure "is viewed as an expense incurred in achieving . . . [wealth maximization], so the aim is to minimize the expense."[70] Parties are encouraged to "resolve disputes themselves consistent with their own economic interest"[71] and courts are to decide unsettled disputes in a manner that furthers "efficiency-maxi-

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[65] *See* Mashaw, *supra* note 61, at 48. Mashaw also suggests that the "failing of *Eldridge* is its focus on questions of technique rather than on questions of value," a focus that "generates inquiry that is incomplete" because it is unresponsive to the "full range" of procedural concerns. *Id.* at 30. He offers and critiques three "alternative theories—individual dignity, equality, and tradition" that are "widely held" and supported "either implicitly or explicitly by the Supreme Court's due process jurisprudence." *Id.* at 46–47.

[66] *See generally* C.J. Goetz, Law and Economics (1983) (discussing the contribution of economic theory to developments in law).

[67] R. Posner, The Economics of Justice 392 (1981).

[68] *See* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 400 (1973) [hereinafter Posner, *Legal Procedure*]; Posner, Federal Courts, *supra* note 48.

[69] Posner, *Legal Procedure*, *supra* note 68.

[70] Bayles, *supra* note 63, at 41.

[71] Garth, *Privatization and New Formalism: Making the Courts Safe for Bureaucracy*, 1988 Law & Soc. Inq. 157, 161.

mizing values."[72] Fairness flows from procedures that require the least expense necessary to achieve accurate determinations.

In his influential critique of the federal courts, Judge Posner underscores this framework.[73] His emphasis on efficiency-maximizing values and call for the reduction of dispute resolution burdens on federal courts draw upon seemingly neutral concepts of widespread appeal.[74]

Commentators have criticized law and economics theory for its linkage of fairness with economic efficiency and its trivialization of social values.[75] They have also criticized it for masking political choices behind seemingly neutral principles. As with the Supreme Court's utilitarian due process theory, law and economics theory supports procedural reforms that shrink the system of dispute resolution and decrease participation by marginal claimants.

3. Accessibility

In contrast, the Federal Rules of Civil Procedure historically linked efficiency with access.[76] The drafters of the rules intended to simplify the traditional procedural model, making the system more accessible by making it more efficient.[77] The

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[72] Posner, Federal Courts, *supra* note 48, at 301; *see also* Bayles, *supra* note 63, at 45 ("The principle of economic costs: one should minimize the economic costs of legal procedures").

[73] Posner, Federal Courts, *supra* note 48.

[74] *Id.* at 208, 301.

[75] For insightful critiques of law and economics theory, see Singer, *Legal Realism Now*, 76 Calif. L. Rev. 465, 513 (1988); Seita, *Common Myths in the Economic Analysis of Law*, 1989 B.Y.U. L. Rev. 993. *See also* Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 Brooklyn L. Rev. 1, 25–26 (1988) [hereinafter Weinstein, *Fiftieth Anniversary of Rules*] (perceiving a hidden agenda and observing "the relative weakening of our economic power . . . has lent weight to the increasing pressure of conservatives to reduce access to our courts with the argument that the transactional costs are too heavy to bear. Increasingly, the disparity of income has coincided with greater reluctance to continue the struggle for equality in the courthouse"); Garth, *supra* note 71, at 163 (noting that dispute narrowing under seemingly neutral law and economics efficiency principles "may quietly be leading to a radical privatization of the courts").

[76] In adopting the Rules in 1938, the Supreme Court noted that the simplified procedures served the goals of efficiency and accessibility. *See The Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, 24 A.B.A. J. 99 (1938).

[77] *See* Clark & Moore, *A New Federal Civil Procedure: II. Pleadings and Practice*, 44 Yale L.J. 1291 (1935) (urging simplification of the system through creation of a single form of action and the merger of law and equity); Clark, *The Handmaid of Justice*, 23

Rules, along with the first forty years of amendments, revolutionized common law and code pleading regimes in basic philosophy as well as in technical form.[78] Notice-pleading replaced archaic fact-pleading. More people with legal grievances could gain entry into the system.[79] The merger of law and equity in conjunction with encompassing joinder rules concentrated litigation in a single forum. Liberal discovery prevented surprise. These reforms responded to the technical rigidity of prior systems, which had fostered procedural manipulation and deemphasized decisions on the merits.[80] The drafters created a less technical system designed to test claims according to information discovered during the litigation, thereby opening the system

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Wash. U.L.Q. 297 (1938) (justifying simplified and regularized procedure); Clark, *Two Decades of the Federal Civil Rules*, 58 Colum. L. Rev. 435 (1958) (discussing philosophical underpinnings of Rules at time of adoption). *See also* Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 Yale L.J. 914, 952 (1976) (pointing to Charles Clark's goal of reducing litigation costs and his strong support of rules favoring plaintiffs).

[78] *See generally* Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 Suffolk U.L. Rev. 351 (1987) (arguing that the drafters of the 1938 rules, prompted by the confusion and lack of uniformity caused by the 1872 Conformity Act in which federal courts were to apply state law, tried to create an ideal process that would provide timely and fair justice to all litigants and centralize federal practice and procedure).

[79] *See* Cound, Friedenthal, Miller & Kane, Civil Procedure—Cases and Materials 441 (1985). Judge Weinstein asserts that the open access goals of the Rules have been realized in significant respects in the 50 years following adoption.

> When the Rules were first adopted, they were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through. Litigants would have straightforward access to courts. The courthouse door was opened to let the aggrieved take shelter. To a very large extent the goal has been reached as nearly as can be expected in a large [diverse] society such as ours . . . .

Weinstein, *supra* note 75, at 23.

Weinstein acknowledges other salient factors in the opening of the federal courts: "a powerful civil rights movement, expanded use of the contingent fee, increased power of the bar, and a devotion of the profession to the principle that all Americans have the right to vindication of what the substantive law in theory affords." *Id.* at 3. I would add to this list, the congressional creation of "rights" enforceable by individuals in federal court and the emergence of public interest law groups.

[80] *See generally* Goodman, *supra* note 78, at 357 ("History records Clark as having advocated two basic principles behind procedural reform. He believed that all cases should be decided on their merits rather than on procedural maneuverings and that a basic goal in litigation should be economy of time and resources"); Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*].

to many previously excluded.[81] Efficiency was linked to procedural justice by rules fostering access.

The goal of "just, speedy and inexpensive"[82] dispute resolution, articulated in Rule 1, endures. The inefficient operation of the Rules, however, has been criticized as undermining that goal. For many committed to the Rules' regime, rejuvenation of the procedural system entails reducing costs and burdens. Efficiency is still linked to procedural justice, but now through rules discouraging access.[83]

For different reasons, all three theories have implicitly supported reform directed at reducing the public and private costs of adjudication. All three have tended to assume a linkage of efficiency with fairness. Cheaper and quicker means better and fairer. They have also assumed procedural neutrality: efficiency measures, litigant-neutral on their face, are neutral in their cumulative effects. These assumptions have encouraged inquiry into techniques for reducing economic costs and administrative burdens without sustained inquiry into the value of the process itself or into long-term group impact.[84] Garth observes considerable public "worry" over explicitly political matters but little attention paid to the "series of seemingly innocuous [system narrowing] reforms . . . [that] are transforming litigation in quite fundamental ways."[85]

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[81] *See also* Weinstein, *supra* note 75, at 24–25 ("The Federal Rules swung the courthouse door wide open. The political implications are now obvious . . . . [T]he Rules provided an immense shift towards increasing plaintiffs' capacity to enforce substantive rights" and "provided the basis for an enormous effort, almost a quantum jump, toward equality in fact"); Marcus & Sherman, Complex Litigation 1 (1985) ("Using the new procedural tools that the Rules made available, creative litigants and judges made the federal court system a significant force for social change.").

Stephen Subrin suggests that Clark and others pushed for expanded access in part to engender support of New Deal constituencies. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981) (cited in Goodman, *supra* note 78, at 352).

[82] Fed. R. Civ. P. 1.

[83] *See* Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2182 (1989) ("Much of the contemporary discussion on procedural efficiency implies that a successful federal court system is one which most effectively *excludes* certain kinds of substantive claims. Efficiency has taken on a value of its own.").

[84] Federal District Court Judge Robert Carter has observed "the development of a school of thought that elevates ideals of efficiency over the [broader] adjudicatory ideals that motivated the framers of the Rules" and a correlative "emergence of a substantive bias in our procedure." *See id.*

[85] Garth, *supra* note 71, at 163. The court administration movement proceeds apace.

B. Specific Procedural Reforms

To place the following observations in context, it must be noted that cases are litigated by a variety of participants before judges of varying political persuasions. In many of these cases, the rules of civil procedure operate more or less even-handedly and provide a workable framework for adjudication. That the reformed procedural system operates acceptably in individual cases does not mean, however, that the sustained cumulative impact of the reforms is litigant-neutral. Procedures may operate well in many cases and yet discretely prejudice the interests of certain groups in others. This part examines the structure of specific efficiency reforms and their probable cumulative impact on groups asserting claims likely to be deemed "marginal" by substantive law.[86]

Judges, court administrators and certain litigants desiring less bulky, complex, and burdensome litigation continue the push. *See* Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. Chi. L. Rev. 306 (1986). Recently, Congress authorized courts to mandate arbitration of cases. *See* 28 U.S.C. §§ 651–58 (1989). Summary jury trials are used increasingly as settlement tools. *See, e.g.*, Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988). Case screening and day-to-day case management are emphasized. Minow, *Speaking of Silence* (Book Review), 43 U. Miami L. Rev. 496, 506 (1988) [hereinafter Minow, *Speaking of Silence*] (noting that from the "legal administration" perspective, the "law should be carefully crafted to avoid false incentives for lawsuits that are not warranted, or that should be resolved through less costly means. Thus cases at the margin should be discouraged").

Risinger calls it a "counter-revolution" in procedure. Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brooklyn L. Rev. 35, 351 (1988) [hereinafter Risinger, *Counter-Revolution*] (procedural reform is a "cynical movement to restore to defendants, particularly powerful, established [repeat player] defendants, traditional procedural advantages they lost by virtue of the Federal Rules' emphasis on full disclosure and decisions on the merits").

[86] Empirical studies have not definitively established the effects of recent reforms. There has been relatively little empirical research about the Rules in operation. The Federal Judicial Center's study of Rules 11 and 16, *see infra* note 102, and the Third Circuit's Task Force on Rule 11, *see infra* note 98, represent initial efforts. This Article's observations about the inhibitory effect of procedural reforms on minority access are therefore cast in the traditional methodology of legal scholarship concerning effects, as a grounded perception. The perception is shared by others. Preliminary studies generally support it, as do commentators. It emerges from case studies, raw statistics, commentary and, to a limited extent, personal experience. Although reliance on perception risks stating the superficial at the expense of the subtle, the overall picture here is compelling and worthy of description. It is a perception of reality by many attorneys and litigants that affects litigation choices. One purpose of this Article is to provide a foundation for further empirical study.

1. Alternative Dispute Resolution

Alternative dispute resolution ["ADR"] is a response to criticisms of excessive litigation costs and systemic insensitivity. Mediation programs handle numerous family disputes. State-mandated court-annexed arbitration systems have proliferated. Congress recently authorized mandatory arbitration of cases with monetary claims under $100,000.[87] Members of the Supreme Court are supportive.[88] Private arbitrators operating in camera with minimal discovery, without formal evidentiary constraints, and, in a limited time frame, dispose of a vast array of cases.

ADR appears to have many benefits. It shortens and reduces the cost of dispute resolution. Participants pay less for lawyers. The judiciary pays less for judges, staff, juries and facilities. ADR allows for early resolution of conflict by means of settlement and deemphasizes winning or losing by court decree. ADR seems to work for ordinary disputes and disputants.[89] The ADR paradigm is a squabble between neighbors, assuming "a rough equality between contending parties."[90]

For those on society's margins, however, ADR presents problems of considerable importance. ADR removes disputes from the light of public scrutiny. Deterrence and public education values served by open proceedings are undermined by ADR.[91] The loss of a public forum can be critical for minorities. Serious public consideration of minority perspectives is sacrificed. ADR also transforms public debates about rights into private judgments about needs, allowing hidden arbitrators to

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[87] 28 U.S.C. §§ 651–58 (establishing a five-year pilot program of mandatory arbitration, with a right of trial de novo, for cases of $100,000 or less in 10 specified judicial districts and authorizing the Judicial Conference to select 10 additional districts for the program).

[88] Justice Anthony Kennedy, in a recent speech to the American Bar Association, supported alternative methods of dispute resolution, citing the 269,000 cases filed in federal court in 1988 and the need to reduce court caseloads. Honolulu Star-Bulletin, Aug. 6, 1989, at A-13, col. 2.

[89] Barkai & Kassebaum, *Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation*, 16 Pepperdine L. Rev. 43 (1989).

[90] Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076 (1984).

[91] *See* Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 Law & Soc. Inq. 145, 151 (1988).

decide disputes according to personal perceptions of minority needs.[92]

Richard Delgado's work on ADR points to the informalism inherent in the structure of ADR that heightens the danger of unfair treatment of minorities.[93] ADR abandons a formal procedural structure that can protect minorities from the biases of decisionmakers and from abuses by other participants. ADR's informalism also eliminates or severely curtails discovery. Opponents with something to hide are better able to hide it. Novel, difficult, or embarrassing claims may fail for lack of access to existing information.

Private arbitrators lack authority to alter or reject existing legal principles in light of developing legal and social concerns. ADR also "trivializes the remedial dimensions of a lawsuit."[94] Arbitrators lack authority to shape, reshape and enforce remedies that are often essential to the dispute resolution process, especially in cases seeking "to safeguard public values by restructuring large-scale bureaucratic organizations."[95]

2. *Amended Rule 11*

For litigation headed toward a federal forum, rigorous prefiling screening is the order of the day. Although reforms have not formally altered the Federal Rules' notice pleading regime, amended Rule 11 has restricted initial entry into the system.[96]

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[92] *See generally* Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 Law & Contemp. Probs. 111, 131 (1988) [hereinafter Trubek, *Sociology of Civil Procedure*] (discussing how ADR shifts focus from vindication of rights to satisfaction of needs and tends to reinforce existing power imbalances).

[93] Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359 (1985) [hereinafter Delgado, *Risk of Prejudice*].

[94] Fiss, *Against Settlement*, *supra* note 90, at 1082.

[95] *Id.* at 1083 (discussing the detriments of avoiding formal adjudication by settlement).

[96] Fed. R. Civ. P. 11 reads:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause

It may be too soon for definitive answers about the Rule's effect on court access. Studies are monitoring litigant, attorney, and judge behavior.[97] Published opinions provide an incomplete picture of Rule 11 activity and caution has been advised in generalizing on the basis of reported cases.[98]

Nonetheless, some compelling conclusions can be drawn from available information. The Rule's efficiency rationale is to lessen the time and cost of litigation by deterring frivolous filings.[99] Its pre-1983 subjective bad faith standard for sanctioning untoward filings made the rule dysfunctional.[100] With its emphasis on "reasonableness," new Rule 11 gives the judge a weapon in the quest for greater efficiency. It has deterred careless, ill-conceived filings.[101] Attorneys have developed a Rule 11 consciousness: "stop, look, and investigate" before filing.[102] That is for the better. When the tide of litigation interpreting Rule 11 subsides, the Rule may be judged alive and useful for ordinary cases involving essentially private disputes.[103]

> unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, . . . including a reasonable attorney's fee.

[97] In addition to the Federal Judicial Center study, *see supra* note 102, and the Third Circuit Task Force study, *see infra* note 98, studies are being conducted by the ABA Litigation Section Task Force on Rule 11 and the Center for Constitutional Rights.

[98] *See* Burbank, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (Conclusion 1) 4–6 (1989) [hereinafter Burbank, Rule 11 in Transition]. Most early reported Rule 11 opinions concerning public interest issues did not acknowledge special concerns in the sanctioning process.

[99] *See* Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 n.5 (9th Cir. 1986).

[100] Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1, 34–42 (1976) [hereinafter Risinger, *Striking Problems*]; Yamamoto, *Case Management*, *supra* note 43, at 429–30.

[101] *See* Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988) [hereinafter Schwarzer, *Rule 11*].

[102] The Third Circuit's Task Force on Rule 11 found in its year-long empirical study that "Rule 11 has had effects on the pre-filing conduct of many attorneys in this circuit of the sort hoped for by the rule makers and has yielded other benefits." Burbank, Rule 11 in Transition, *supra* note 98.

The Federal Judicial Center Report on Rule 11 concludes that the rule has deterred wasteful filings "by making lawyers more aware of their specific professional duty to investigate and research claims before filing." Federal Judicial Center, The Rule 11 Sanctioning Process (1988).

[103] *See* Schwarzer, *Rule 11*, *supra* note 101. The Supreme Court's only Rule 11 decision is Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989) (addressing the narrow issue of whether sanctions can be imposed against the offending attorney's firm).

But all is not well. Rule 11 disproportionately affects civil rights cases. Early Rule 11 research suggests that Rule 11 is being "used disproportionately against plaintiffs, particularly in certain types of litigation such as civil rights cases, employment discrimination cases, securities fraud cases brought by investors and antitrust cases brought by small companies."[104] The Third Circuit Task Force on Rule 11 recently completed a year-long study of all civil cases in that circuit's district courts. The Task Force acknowledged that sanctions were not routine in the Third Circuit but nevertheless found that Rule 11 had a markedly disproportionate impact on civil rights cases.[105] The Task Force concluded that Rule 11 has "changed the role of the attorney" and may lessen the "threshold probability that a lawyer will take a case or pursue an argument." This may "combine with other factors to inhibit access to the courts for litigants with marginal, even arguable, claims or defenses."[106]

What has emerged among many lawyers, judges and commentators is the perception that Rule 11's disproportionate impact on civil rights and other public interest cases dissuades attorneys and litigants from contemplating these types of lawsuits.[107] Sanctions in civil rights cases are sometimes imposed

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[104] Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988). Of the reported Rule 11 cases in Vairo's study, 28.1% were civil rights and employment discrimination cases. A similar study by Nelken revealed that although civil rights filings comprised only 7.6% of the filings for 1983–85, civil rights cases comprised 22.3% of the Rule 11 cases during that period. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1327 (1986). Plaintiffs in these cases were sanctioned four times as often as defendants. *Id.* at 1328 nn.96–97. In a cautionary note, the Third Circuit Task Force Report warns of overreliance on statistics of published cases. The Task Force study found that only 9.1% of district court decisions involving Rule 11 were reported. The ratio of sanctions over requests was much higher for reported cases (40%) than for all cases (19.8%). Burbank, Rule 11 in Transition, *supra* note 98, at 99.

[105] Burbank, Rule 11 in Transition, *supra* note 98, at 61–62, 69. The Task Force found that the Third Circuit's approach to Rule 11 is a cautious one, generally limiting Rule 11 to "exceptional" cases of frivolousness. *Id.* at 85. It still found that Rule 11 had a markedly disproportionate impact on civil rights plaintiffs in the circuit. Civil rights plaintiffs and their attorneys were sanctioned at a "considerably higher rate" (47.1%) than plaintiffs in other cases (8.45%). *Id.* at 69.

[106] *Id.* at 7. The Task Force was particularly concerned about the adverse effects of Rule 11 sanctions on poor litigants. *See id.* at 71–72.

[107] *See, e.g.*, LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 Val. U.L. Rev. 331 (1988); Tobias, *Rule 11 and Civil Rights Litigation*, 37 Buffalo L. Rev. 485 (1989); Vairo, *supra* note 104. My own initially cautious view of Rule 11 has become more so. The Rule's benefits—and there have been benefits to courts, litigants, and the public—must now be evaluated not just in light of a theoretical possibility of a chilling of court access, but in light of recent empirical evidence of disproportionate impact.

in "very close cases"[108] and are often imposed for plaintiffs' attorneys' assertions of novel legal theories that courts determine to be unfounded.[109]

The shared assumption of commentators is that Rule 11's chilling effect is bad: it stifles the growth of common law and retards social progress. Some room exists for debate about the wisdom of sanctioning attorneys disproportionately in cases involving public law issues.[110] There are many more public law cases than there were thirty years ago.[111] Some think too many of these cases have been litigated for ulterior purposes. Others think too many civil rights complaints are knee-jerk reactions to governmental grievance.[112] A recent study of constitutional tort litigation indicates that this is not the case.[113] But viewpoints vary.

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[108] Vairo, *supra* note 104, at 217 (sanctions in many, although not all, civil rights and public interest cases involved "very close cases").

[109] *Id.* at 205–06. Vairo found that "most of the sanctions in the civil rights categories are awarded because the plaintiff's legal theory has been held to be frivolous." *Id.* at 202. Rule 11 sanctions are most frequently awarded in civil rights cases when the claim is inconsistent with well-settled principles of law. The Task Force warned against a sanctioning approach that penalized attorneys for advancing novel arguments. "Rule 11 may be regarded as a case management tool, but it is one that should be used with the greatest possible caution in cases where plaintiffs seek vindication of what they perceive to be their constitutional rights." Burbank, Rule 11 in Transition, *supra* note 98.

This suggests that some, if not many, courts are narrowly reading Rule 11's allowance of "a good faith argument for the extension, modification, or reversal of existing law." Fed. R. Civ. P. 11. The advisory committee note to Rule 11 also cautions that the amended Rule is not intended to "chill" creative advocacy. Fed. R. Civ. P. 11., advisory committee's note.

[110] Vairo finds it "difficult to generalize about what these statistics mean." They could mean that "there are relatively more frivolous civil rights cases" or "that Rule 11 is an unfair tool for defendants that allows them to unfairly attack this kind of litigation, which has long been a bane to their existence." Vairo, *supra* note 104, at 201. The Federal Judicial Center study offered possible explanations of statistics showing disproportionate impact on civil rights plaintiffs. One explanation equated the likelihood of sanctions to the amount of judicial involvement required. The more time-consuming the case, and civil rights cases tend to require substantial judge time, the greater likelihood of sanctions. Federal Judicial Center, *supra* note 102, at 162–63.

[111] *See* Chayes, *Role of the Judge*, *supra* note 44.

[112] "Relatively low barriers to entry have . . . generated an undesirable result—a deluge of frivolous or vexatious claims, filed by the uninformed, the misinformed, and the unscrupulous." Lepucki v. Van Wormer, 765 F.2d 86, 87 (7th Cir. 1985).

[113] Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719 (1988). The study found that the number of constitutional tort cases filed in federal court has actually been less than popularly perceived. The study "uncovered little evidence that the number of constitutional torts should be a cause for special concern." *Id.* at 779. Referring to their earlier study, Schwab and Eisenberg noted that the proportion of civil rights filings as compared to the entire federal civil docket declined during the

The present inquiry focuses more narrowly upon an area of generally shared assumptions in which there has been little critical discourse: the inhibiting effect of Rule 11 on judicial access for minorities.[114] Judge Carter observes that "Rule 11 has not been wielded neutrally"[115] and that applications of the rule evince "extraordinary substantive bias" against certain minority claims.[116] The Seventh Circuit's decision in *Szabo Food Service v. Canteen Corp.* is illustrative.[117]

In *Szabo*, a minority contractor challenged the loss of its food service contract with a county jail, alleging racial discrimination, due process violations and pendent state law claims.[118] An evaluation committee had given Szabo's bid top rating but the county board had accepted another company's bid. After seeking an expedited hearing on its application for a preliminary injunction, Szabo voluntarily dismissed its federal complaint and filed suit in state court. The federal district court judge denied the defendant's motion for sanctions following dismissal.[119] The

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period from 1975 to 1984. *Id.* at 721 (citing Schwab & Eisenberg, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 658–68 (1987)).

[114] During the debate about the proposal to amend Rule 11, critics questioned whether the Rule would chill zealous but legitimate advocacy, limit the development of the law, and harm relationships between attorneys and judges, and among attorneys. The Advisory Committee on Civil Rules subsequently acknowledged these concerns in the final version of the Rule and its report. It did not address, however, concerns about diminishing access for the poor or social groups likely to be asserting marginal claims, especially minorities. *See* Advisory Committee on Civil Rules, Analysis of Comments Regarding Committee's Proposed Amendments to Rules 7 and 11, at 2–3 (Dec. 1981) (discussed in Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925, 1952, 1955 (1989) [hereinafter Burbank, *Transformation*].

[115] Carter, *supra* note 83, at 2192.

[116] *Id.*

[117] 823 F.2d 1073 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1101 (1988). The following discussion of *Szabo* and other cases is not necessarily representative of judicial views and behavior in all circuits or even in most cases. The cases are significant because they are neither aberrations nor loosely considered decisions. They are decisions by well-regarded judges that have captured the attention and engendered the concern of lawyers, judges and scholars. They are also significant because they reflect the prevailing thinking of some courts and because they have become part of litigators' consciousness.

[118] *Id.* at 1075. Prior to bidding on a second contract, Szabo Foods, which held the first contract, formed a joint venture with a minority-owned restaurant enterprise, thus qualifying to bid for the 30% minority set-asides.

[119] The American rule precluded an award of attorney's fees to defendants and the Civil Rights Attorney's Award Act was inapplicable since defendants were not "prevailing parties." 42 U.S.C. § 1988 (1982). Defendants were not even entitled to costs since, under Fed. R. Civ. P. 41(a)(1)(i), dismissal was voluntary. Szabo later filed an unsuccessful state law action in state court.

Seventh Circuit reversed the denial of defendant's request for fees and remanded, holding Szabo's due process claim frivolous and indicating that the district court should find the discrimination claim frivolous as well.

Judge Easterbrook, joined by Judge Posner, noted that since Szabo had "imposed costs on its adversary and the judicial system by violating Rule 11, it must expect to pay."[120] In finding the violation, the court engaged in a very narrow analysis of the legal foundation for Szabo's due process claims.[121] Easterbrook also went to seemingly improper lengths to signal to the district court the frivolousness of the equal protection claim. Szabo claimed that it qualified for minority set-asides established by county ordinance. The majority concluded that such set-asides were probably unconstitutional and therefore could not serve as a basis for Szabo's claim. In light of Szabo's voluntary dismissal, the issue of minority set-asides had not been fully litigated. More important, the court's ruling appeared to conflict in principle with a Supreme Court decision upholding congressionally legislated minority set-asides.[122] At a minimum, Szabo had a plausible legal argument supporting its position.

Why did the majority reverse the district court and remand for the imposition of sanctions? Judges Easterbrook and Posner, two eminent conservative jurists, revealed their disaffection for Szabo and its constitutional claims when they speculated that the motive for the claims may have been to harass the defendants.[123] One criticism of the opinion is that the judges employed Rule 11 to signal general distaste for minority equal protection and due process challenges to governmental practices and to deter filing of all but the most certain of such claims.[124]

Dissenting Judge Cudahy criticized the majority's expansive approach toward Rule 11. He predicted that the "chilling

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[120] 823 F.2d at 1079.

[121] Szabo based its "entitlement" to due process on L & H Sanitation v. Salt Lake City Sanitation, 769 F.2d 517, 523–24 (8th Cir. 1985) and Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980). The majority found those cases, concededly supporting Szabo's argument, to be "obscure" and contrary to the greater weight of authority. 823 F.2d at 1081–82.

[122] *See* Fullilove v. Klutznik, 448 U.S. 448 (1980).

[123] 823 F.2d at 1082.

[124] *See* LaFrance, *supra* note 107, at 333. *See also* Lepucki, 765 F.2d 86 (another Seventh Circuit case evincing a similar view).

effect of today's decision will reach as tellingly to the most meritorious [of] such claim[s] as to the least."[125] Judge Cudahy further observed, "Rule 11 [will be transformed] from a protection against frivolous litigation . . . into a fomenter of derivative litigation, a mire for unwary parties and overzealous courts."[126]

Another application of Rule 11 evincing a substantive bias involves the government officials' good faith immunity defense. Some courts require that a civil rights plaintiff's attorney attest when suit is filed that the defendant government official cannot succeed on an immunity defense.[127] The defendant, however, usually controls all or most of the information relevant to that defense.[128] Plaintiff's attorney is therefore thrust into an unfair dilemma. Does she refrain from filing what appears to be a plausible civil rights claim to avoid sanctions out of fear that her client may lose on an affirmative defense about which only limited information is initially available? Or does she file, gambling that the defendant cannot establish good faith immunity and that sanctions will therefore not be imposed? One judge characterizes the approach as "no information until litigation, but no litigation without information."[129]

This approach to Rule 11 not only undercuts notice pleading standards, it erects an inordinately high barrier between courts

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[125] 823 F.2d at 1086 (Cudahy, J., concurring in part and dissenting in part).

[126] *Id.* at 1085. *See* Burbank, Rule 11 in Transition, *supra* note 98. In Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987), the Seventh Circuit followed *Szabo* and affirmed an award of sanctions against an African-American doctor and his attorney who challenged the state licensing exam on race and age discrimination grounds not warranted by existing law. "Rule 11 is the appropriate vehicle to punish those who abuse their right of access to the federal courts." *Id.* at 1439. Sanctions were deemed appropriate even though the court acknowledged that the law on the pivotal state action issue was "complex and fluid," *id.* at 1436, and despite the district court's failure to decide whether the claims were "so 'untenable' as to justify sanctions." *Id.* at 1437.

[127] The plaintiff in Elliot v. Perez, 751 F.2d 1472 (5th Cir. 1985), asserted civil rights violations by a state district attorney and judge. Prior to *Elliot*, the Supreme Court established that good faith official immunity is an affirmative defense that must be asserted by the defendant. *See* Gomez v. Toledo, 446 U.S. 635 (1980). The Fifth Circuit ignored the Court's pronouncement and sent the following message through its Rule 11 analysis: a minority plaintiff's civil rights filing against a government official is sanctionable unless plaintiff's attorney is able to certify at the time of filing that the "defendant official cannot successfully show he has the defense of immunity." 751 F.2d at 1482.

[128] For this reason, among others, the Supreme Court in *Gomez* denoted the defense an affirmative defense.

[129] Johnson v. United States, 788 F.2d 845, 856 (2d Cir. 1986) (Pratt, J., dissenting), *cert. denied*, 479 U.S. 914 (1986).

and minorities with civil rights claims against local government officials.[130] Another approach, with similar impact, links a plaintiff's failure to survive summary judgment with Rule 11 sanctions. In *Bryant v. O'Connor*,[131] an African-American former employee of a federal district court judge alleged discrimination in the termination of his employment. Bryant challenged the notion that judicial robes cleanse the wearer of even subtle prejudice. His claim seemed likely to fail.[132] The district court, however, expanded the boundaries of Rule 11 seemingly to punish Bryant for making the charges and attempting to expose bias in the local courts. The court denied his request for limited discovery to respond to defendants' motion for summary judgment,[133] granted summary judgment, and imposed sanctions. In so doing, the court articulated a startling interpretation of Rule 11: if at the time of filing the plaintiff lacks evidence to defeat defendant's subsequent summary judgment motion, the plaintiff has probably violated Rule 11.[134] If the court means what it said, the consequences are severe. Rule 11 precludes filing of em-

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[130] Perhaps in response to criticisms of rulings such as *Elliot*, the Fifth Circuit, en banc, recently adopted a strong position on the preclusion of judicial access for litigants already sanctioned. The court stated that "the imposition of sanctions must not result in total, or even significant, preclusion of access to the courts." Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 881 (5th Cir. 1988). Where an immediately payable monetary sanction order might financially prevent the litigant from continuing with the suit, the district judge must, at the litigant's request, (1) make the sanction payable after final judgment, or (2) explain "why the award does not have such a preclusive effect." *Id.* at 881–82.

[131] 671 F. Supp. 1279 (D. Kan. 1986), *aff'd*, 848 F.2d 1064 (10th Cir. 1988).

[132] The federal district court judges, en banc, in a quasi-administrative review, had approved Bryant's dismissal. *Id.* at 1281.

[133] In response to the court's order, plaintiff's attorney submitted a discovery plan of five depositions of court personnel. The district court rejected the plan because it did not explain why those people were to be deposed. *Id.* at 1282–83.

[134] "Plaintiff argues that he has insufficient facts to respond to the motion for summary judgment. This suggests that plaintiff failed to comply with the requirements of Rule 11." *Id.* at 1283. Taking what appears to be a contrary view in a non-Rule 11 situation involving filing fee waivers for indigents, the Supreme Court recently held that a complaint is not automatically "frivolous" because it fails to state a claim under Rule 12(b)(6). Writing for the Court in Neitzke v. Williams, 109 S. Ct. 1827 (1989), Justice Marshall stated that the standard of 28 U.S.C. § 1915(d), precluding waiver of filing fees for complaints filed *in forma pauperis* differs from the Rule 12(b)(6) standard. Not all unsuccessful claims are frivolous. *Id.* at 1833. Marshall cautioned against denying indigent plaintiffs the same protections of Rule 12(b)(6) accorded those with resources, like the opportunity to amend the complaint before the motion to dismiss is heard. Such protections are denied if an indigent's complaint is dismissed sua sponte as frivolous under § 1915(d). *Id.* at 1834.

ployment discrimination claims against powerful institutional defendants when those claims cannot survive summary judgment at the outset. If the court did not mean what it said, then a pall of racial favoritism hangs over its personnel decisions. Rule 11 appears in this light to be a pretext for avoidance of full exploration and public explication of the substantive charges. Either scenario discourages minority claimants when critical evidence of discrimination initially rests in the control of institutional defendants.

For this reason, substantive bias underlying publicized applications of Rule 11 may be taking its "toll in intimidation from those who are seeking to vindicate novel rights by means of untried strategies."[135] Judge Carter cites recent sanctions of $54,000 against NAACP Legal Defense and Education Fund counsel and $30,000 against two plaintiffs.[136] Judge Reinhardt of the Ninth Circuit has expressed similar concern about lower court interpretation and application of Rule 11 to deter all but mainstream claims based on settled legal principles. In *Operating Engineers Pension Trust v. A-C Co.*,[137] the district court

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[135] Carter, *supra* note 83, at 2192. Professor Tobias aptly describes the "inherent characteristics" of civil rights litigation that encourage Rule 11 sanctions when advancing "untested theories of law." Civil rights suits attempting to "assert new or comparatively untested theories of law . . . are at the cutting edge of legal development, which means that they are difficult to conceptualize and substantiate . . . . [D]iscovery can be essential to drafting a very specific complaint or to articulating a precise theory . . . and . . . the concepts, once formulated, look non-traditional and even implausible." Tobias, *supra* note 107, at 496–97.

[136] *See* Carter, *supra* note 83, at 2194 (citing Harris v. Marsh, 679 F. Supp. 1204 (E.D.N.C. 1987)). In *Harris*, minority plaintiffs charged the Army with discrimination in its civilian employment practices in a particular locale. The case was cumbersome, with 6 original plaintiffs and 44 intervenors. The trial was long and some degree of judicial frustration about case management may have been understandable. *See id.* at 1227–37. The trial judge's Rule 11 decision, however, seemed to signal distaste for the substance of antidiscrimination law, noting that "charges of racism, if proved, carry an enormously stigmatizing effect." *Id.* at 1221. Plaintiffs had survived summary judgment but lost at trial on the issue of subjective intent. The court imposed sanctions apparently to discourage racial discrimination suits unsupported by direct evidence of "illicit intent." Standing Title VII on its head, the trial judge found that "to the extent any racism was proven . . . such discrimination was generally perpetrated by the plaintiffs upon the defendant, not the reverse, for it was the plaintiffs who consistently saw every criticism and action in a blindly racial context." *Id.* at 1227.

[137] 859 F.2d 1336 (9th Cir. 1988) ("[W]e have been required with some regularity to reverse district court awards of sanctions." *Id.* at 1345). *See, e.g.*, United Energy Owners Comm. v. U.S. Energy Management Sys., 837 F.2d 356 (9th Cir. 1988); Gonzales v. Parks, 830 F.2d 1033 (9th Cir. 1987); Lemos v. Fencl, 828 F.2d 616 (9th Cir. 1987); Garrett v. City and County of San Francisco, 818 F.2d 1515 (9th Cir. 1987); California

ruled against the plaintiffs and imposed Rule 11 sanctions for plaintiffs' unsuccessful legal argument. The Ninth Circuit not only vacated the award of sanctions, it reversed the district court on the merits. Judge Reinhardt chastised the district court for sanctioning plaintiffs making eminently plausible legal arguments and for thereby erecting a barrier to the courts for those seeking to change the law.[138]

Rule 11 sanctions escalate the professional and financial risk of litigating cases that are important to bring but difficult to win. Contingent fee, reduced fee, and pro bono lawyers and public interest firms are most likely to represent minorities raising difficult issues. In so doing, they accept a financial risk. If their clients lose, and they often will, the attorneys receive little or no compensation. For a small firm or a public interest law organization, that risk can be significant. If losing, however, means not only uncompensated time spent but also out-of-pocket payment of defendants' attorney's fees, the risk expands exponentially.[139] The NAACP has thus called for repeal of Rule

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Architectural Bldg. Prods. v. Franciscan Ceramics, 818 F.2d 1466 (9th Cir. 1987); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986); *In re* Yagman, 796 F.2d 1165 (9th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1985).

See also Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 631–32 (1986):

> New ideas of justice reflected in the very categories of cases to which Rule 11 is most often applied have in recent years expanded the meaning of equality, the scope of individual rights, and the strength of the welfare state. The degree to which the legal system should remain open as a forum for debate about, and even adoption of, new versions of justice is part of what is at stake in decisions about how broadly to use Rule 11.

[138] 859 F.2d 1336. *Operating Engineers* stands firmly for the view that "free access to the judicial system" is essential and that Rule 11 sanctions should be reserved for the "rare and exceptional case where the action is clearly frivolous." *Id.* at 1344. *See also* Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985), *remanded*, 637 F. Supp. 558 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987).

[139] The $1 million sanction imposed upon the Christic Institute and its attorneys is a notable example. The Rule 11 sanction heard around the country, imposed upon the Christic Institute, also involved issues of government accountability for corruption and illegal covert activities, this time in Central America. In Avirgan v. Hull, 705 F. Supp. 1544 (S.D. Fla. 1989), the district court imposed sanctions of almost one million dollars upon plaintiffs and their attorneys, the liberal Christic Institute law group and its lead counsel.

One of the plaintiffs had been injured by a bomb in the jungles of Nicaragua. He alleged that he was a victim of an international conspiracy "spanning thirty years and

11[140] as has a coalition of scholars.[141] Others are attempting to craft workable guidelines to restrict the Rule's application.[142]

3. Civil Rights Pleading Requirements

Linked to concerns about Rule 11's chill are heightened pleading standards for civil rights cases. Although the Supreme Court has not countenanced such elevated pleading requirements, several courts have boosted civil rights fact pleading thresholds well above those provided by the Federal Rules in an apparent effort to deter initiation of "disfavored" actions.[143] One reason some courts disfavor civil rights cases is the time and cost of litigation. The requirement of particularized fact pleading in a civil rights action is premised on a belief that "[a] claim of this sort should not be initiated unless there is a sufficient factual basis to justify the extensive litigation that such a

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involving the activities of former United States Government Officials, Central Intelligience Agency operatives, Colombian druglords and arms merchants in Cuba, Southeast Asia, the Middle East, and Central America." *Id.* at 1545. After two years of discovery, the district court dismissed the claims and imposed sanctions, finding an "abuse of judicial process" and that the "Christic Institute, must have known prior to suing that [the plaintiffs] had no competent evidence to substantiate the theories alleged in their complaint." *Id.*

The Christic Institute has gained considerable notoriety in its efforts to obtain support for its appeal and to raise funds to pay the fine. Whether the case was carelessly conceived or poorly litigated appears to be an open question. The clear public message emanating from the district court and carried by the Christic Institute itself is that Rule 11 is operating to chill all but the most certain claims of government corruption and lack of accountability.

[140] Resolution No. 11, *The Repeal of Rule 11 of the Federal Rules of Civil Procedure*, The Crisis (Dec. 1988).

[141] In 1989, a group of law professors submitted a formal request to the Reporter Federal Rules Advisory Committee requesting reconsideration and repeal of amended Rule 11. *See also* Tobias, *supra* note 107, at 525 (recommending immediate reformulation or repeal).

[142] *See* ABA Section on Litigation, Subcommittee Guidelines to Rule 11 [forthcoming].

[143] *E.g.*, Colburn v. Upper Darby Township, 838 F.2d 663, 667 (3d Cir. 1988); Hale v. Harney, 786 F.2d 688 (5th Cir. 1986); Jones v. Community Redevelopment Agency, 733 F.2d 646 (9th Cir. 1984); United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980); Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976); Valley v. Maule, 297 F. Supp. 958 (D. Conn. 1968). *See* Subrin, *How Equity Conquered Common Law*, *supra* note 80, at 984; Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 471 (1986).

claim entails."[144] Another reason that some courts disfavor these cases is their distaste for the substantive goals of civil rights litigation.[145]

Under either rationale, heightened fact pleading requirements for civil rights claims "would seem to violate the Federal Rules," since the notice pleading requirements of Rule 8, rather than the particularized pleading requirements of Rule 9, govern civil rights claims.[146] The heightened requirements nevertheless seem to be widespread. Commenting on the systematic application of "very strict pleading standards at odds with . . . Rule 8(a)," Roberts observes, "this trend now has attained great momentum, possibly because [of] such a strict standard's perceived virtue—the judicial ability to dispose summarily of unattractive cases."[147]

One consequence is to discourage the filing of minority civil rights claims where evidence of wrongdoing is in the hands of the institutional defendants. This result undermines the decisions-on-the-merits philosophy of the Federal Rules.[148] Another consequence, which further inhibits court access, is attorneys'

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[144] Smith v. Ambrogio, 456 F. Supp. 1130, 1137 (D. Conn. 1978). *See also* Hale v. Harney, 786 F.2d 688, 692 (5th Cir. 1986) ("[T]he day is past when our notice pleading practice . . . plus liberal discovery rules invited the federal practitioner to file suit first and find out later whether he had a case").

[145] *See* Marcus, *supra* note 143, at 471, 477 ("The most common focus for disapproval are civil rights cases, but such claims should not be disfavored." Marcus also observes greater fact specificity required in a related and also "disfavored" type of case, that is, claims of "the poor").

[146] Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C.L. Rev. 1023, 1037 (1989) [hereinafter Louis, *Doubtful Litigation*]. *See also* Marcus, *supra* note 143, at 449 (despite the absence of authorization in the Federal Rules, "[m]any lower federal courts have nevertheless revived fact pleading requirements in such [civil rights] cases"). *Cf.* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983) (noting in dictum in a massive antitrust case that district courts should insist upon "some specificity in pleading before allowing a potentially massive factual controversy to proceed"); Haines v. Kerner, 404 U.S. 519 (1972) (per curiam) (pro se inmate civil rights complaints are to be assessed under a less stringent standard than complaints prepared by attorneys).

[147] Roberts, *Fact Pleading, Notice Pleading and Standing*, 65 Cornell L. Rev. 390, 416–21 (1980). Heightened fact pleading requirement for securities fraud cases, the other major target of "fact pleading," is expressly authorized by Federal Rule 9(b). In contrast, heightened fact pleading for civil rights cases is unauthorized by the Rules. Marcus, *supra* note 143, at 447, 449.

[148] *See* Louis, *Doubtful Litigation*, *supra* note 146, at 1038 ("Civil rights claims often involve clandestine wrongdoing and unequal access to the evidence [and] they sometimes cannot be pleaded with particularity.").

escalated financial and professional risk in light of expansively applied Rule 11 sanctions for claims not "well-grounded in fact."[149]

4. Reformulated Summary Judgment Standards

New summary judgment standards await plaintiffs who make it past ADR, remain undeterred by Rule 11, and survive heightened pleading standards. The courts have reformulated summary judgment law for certain civil rights appeals and for defendant motions generally.

Government officials are burdened by the defense of civil rights claims. Although the actual number of constitutional tort filings has been steadily declining, some perceive civil rights cases as clogging the courts and hampering the performance of public officials.[150] To lessen the burden on these officials, the Supreme Court restructured the appealability of certain denials of summary judgment motions. In *Mitchell v. Forsyth*,[151] the Court held that where the defendant raises a qualified immunity defense, a district court's denial of the defendant's summary judgment motion based on that defense is immediately appealable.[152] Litigation of the case is stayed pending defendant's appeal. Defendants hold the key to the courthouse door and thereby have gained a tremendous procedural advantage. Summary judgment denials are not appealable by right in other types of cases. The result in the civil rights realm is that plaintiffs and their attorneys must consider the added time and cost of filing suit in light of defendants' right to file interlocutory appeals. Heightening the risk are lower court interpretations of *Mitchell* that allow the defendant multiple pretrial appeals.[153]

General summary judgment analysis has been significantly altered by a trilogy of recent Supreme Court cases. As a result,

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[149] *See supra* notes 107–109, 114, 139 and accompanying text.

[150] Schwab & Eisenberg, *supra* note 113, at 720–21.

[151] 472 U.S. 511 (1985).

[152] *Id.* at 526–27. In *Mitchell*, the Court held that in light of Harlow v. Fitzgerald, 457 U.S. 800 (1982), good faith immunity is a narrow, purely legal determination and the denial of summary judgment on that issue qualifies as an appealable collateral order under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1941).

[153] *See, e.g.*, Chapman v. Pickett, No. 83-28 (7th Cir. Jan. 5, 1988); Green v. Carlson, 826 F.2d 647, 651 (5th Cir. 1987).

products liability, employment discrimination, and civil rights plaintiffs, particularly those attempting to prove illegality by circumstantial evidence and minorities asserting claims based on alternative social construction of "facts," will find their access to a public trial curtailed.

According to Chief Justice Rehnquist in *Celotex Corp. v. Catrett*,[154] Rule 56 enables defendants to move for summary judgment by asserting simply that the plaintiff has not discovered sufficient evidence to support her claim. Defendants no longer need to support motions with affirmative evidence negating an element of the plaintiff's claim.[155] For such motions, respondent-plaintiff in effect bears the entire burden of producing, organizing and arguing the evidence.[156] *Celotex* thus makes a defendant's summary judgment motion a potential discovery device and "tool[ ] of harassment."[157]

Anderson v. Liberty Lobby[158] and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*[159] further enhance the utility of summary judgment motions for defendants. *Anderson* abrogated the "scintilla of evidence" standard for denying summary judgment motions and replaced it with an ostensible evaluation of the "quality" and the "caliber" of the evidence and a weighing

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[154] 477 U.S. 317 (1986).

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> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon a motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Id. at 322. In the hope of tempering the forceful and sweeping impact of Chief Justice Rehnquist's statement, Justice Brennan, dissenting, noted, "plainly, a conclusory assertion that the non-moving party has no evidence is insufficient. Such a 'burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment." *Id.* at 332 (Brennan, J., dissenting) (citation omitted).

[156] *See* Kaufman v. Puerto Rico Tel. Co., 841 F.2d 1169 (1st Cir. 1988) (applying the *Celotex* approach in a political discrimination case and awarding defendants summary judgment); LaBeach v. Nestle Co., 658 F. Supp. 676, 687–88 (S.D.N.Y. 1987) (applying the *Celotex* approach in a race discrimination case and holding that the respondent-plaintiff "is required to come forward with some proof that there is a genuine issue of material fact. There has been no evidence presented of systemic discrimination or disparate impact").

[157] *Celotex*, 477 U.S. at 332 (Brennan, J., dissenting).

[158] 477 U.S. 242 (1986).

[159] 475 U.S. 574 (1986).

of conflicting evidence according to the standard of proof at trial, e.g., preponderance of the evidence.[160] *Matsushita* discouraged the assertion of novel legal theories in complex cases. It authorized summary judgment when the judge deems the plaintiff's theory "implausible," even though conflicts of material fact exist,[161] and required the plaintiff-respondent to present "evidence that tends to exclude the possibility" that the defendant acted properly.[162] These troublesome aspects of *Matsushita* have been extended by lower courts to employment discrimination cases to empower the judge first to assess the implausibility of the claim and then to dismiss it, despite inferences jurors might draw from direct evidence favorable to the plaintiff.[163] As a result, considerable interpretive discretion has been infused into the summary judgment calculus, thereby facilitating dismissal of marginal claims.

The expressed goal of reformulating summary judgment standards is the elimination of "meritless" claims or defenses earlier in the litigation process to make the system more efficient. Most judges, lawyers and commentators have long perceived a need to make the summary judgment mechanism more balanced and useful. The Supreme Court trilogy and the reforms proposed by the Advisory Committee,[164] however, have not steered a middle course between plaintiffs and defendants. Instead, they have dramatically shifted litigation power to defendants by encouraging the dismissal of marginal claims. One commentator recently observed that amendments to Rule 56

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[160] 477 U.S. at 252, 254 (judge must "bear in mind the actual quantum and quality of proof necessary to support liability" and determine whether the "evidence presented . . . is of insufficient caliber or quantity").

[161] 475 U.S. at 587 (finding plaintiffs' theory made "no economic sense" and was "implausible").

[162] *Id.*

[163] In Beard v. Whitley County R.E.M.C., 840 F.2d 405 (7th Cir. 1988), the Seventh Circuit affirmed summary judgment for the defendant employer on a gender discrimination claim, although plaintiff proffered direct evidence of statements by the defendant that might have been construed by jurors as showing "anti-female animus." The judge, making his own assessment of plausibility, said he did not "believe" that the evidence raised "anything more than a 'metaphysical doubt' [about defendant's intent] that, under *Matsushita* is insufficient to create a genuine issue of material fact." *Id.* at 410 (citation omitted).

[164] *See* Advisory Committee on Civil Rules, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, 105–20 (Sept. 1989).

proposed by the Advisory Committee are "unabashedly pro-defendant."[165] Another described the trilogy's reformation of standards as a "terrible trap for the unwary" plaintiff.[166] One apparent effect of the changes has been to preclude trials of claims of public concern not supported by hard evidence. Another effect has been to deprive juries of opportunities to reassess the meaning of undisputed "facts" in light of changing social conditions.[167] Minorities will likely feel the impact. Altered summary judgment standards bear the potential for decreasing a minority plaintiff's chances of publicly presenting her perspective and highlighting underlying social issues.

5. *Other Procedural Reforms*

This sometimes subtle constriction of access at each stage of the judicial process is accompanied by other developments that have narrowed access to the courthouse for public interest litigants and minorities.

Over the last ten years, the doctrines of standing[168] and eleventh amendment immunity[169] have evolved to limit plain-

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[165] Louis, *The Past, Present, and Future of Summary Judgment*, presentation given to the Association of American Law Schools' Section on Civil Procedure (Jan. 5, 1989) (recording on file with the author). Martin Louis also commented that the power shift is so pronounced that it takes the rule "past middle ground, back to the Field Code," where the plaintiff had to run a procedural gauntlet. "Everything is on the defendant's side." *Id.* Louis' comments are especially poignant, and ironic, because his article is widely credited as providing initial impetus for an analytical reformation of summary judgment procedure. *See* Louis, *Doubtful Litigation*, *supra* note 146.

[166] Vairo, *New Trends in Summary Judgment Practice*, in ALI-ABA Course of Study 103 (Feb. 1987).

[167] *See* Risinger, *Counter-Revolution*, *supra* note 85, at 39 ("The Supreme Court seems to have been numb to these 'price of admission' functions, particularly in *Celotex*, and as a result has introduced a procedure which is asymmetrical, grossly favoring defendants over plaintiffs no matter which party is the movant"); *See generally* Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95 (1988) (arguing that recent Supreme Court decisions on summary judgment and directed verdict depart greatly from the generally accepted understanding of their proper role).

[168] *See* Gilmore v. Utah, 429 U.S. 1012 (1976) (denying standing, the court asserted a prudential limitation beyond the constitutional mandate of "case or controversy" that the courts not hear a "generalized grievance" shared in substantially equal measure by all or a large class of citizens); Warth v. Seldin, 422 U.S. 490, 499 (1975).

[169] Welch v. State Dep't of Highways & Public Trans., 483 U.S. 468 (1987) (expanding scope of state immunity under eleventh amendment, barring federal court Jones Act suits against states).

tiff's ability to litigate in the "public interest."[170] The jurisdictional reach of federal and state courts over nonresidents has been limited.[171] Heightened burdens of proof of subjective discriminatory intent have restricted application of the equal protection clause.[172]

In addition, utility of the public interest class action in federal courts has been severely undercut.[173] *Snyder v. Harris*,[174] *Zahn v. International Paper Co.*,[175] and *Eisen v. Carlisle & Jacquelin*[176] erected high jurisdictional and notice barriers for such class actions. *Evans v. Jeff D.*[177] now enables class defendants to require that plaintiff's class attorneys waive their right to defendant payment of attorney's fees as a condition of settlement.[178]

Judicial construction of the Civil Rights Attorneys Fees Awards Act[179] undermines the Act's purpose in difficult cases of arguable merit. Prevailing defendants can recover attorneys' fees from plaintiffs without a showing of bad faith.[180] Moreover,

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[170] Reinhardt, *Limiting Access to the Federal Courts: Round Up the Usual Victims*, 6 Whittier L. Rev. 967, 968 (1984).

[171] Recent decisions have limited state court in personam jurisdiction. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84, *reh'g denied*, 438 U.S. 908 (1978). In 1988, Congress raised the amount in controversy requirement in diversity actions from $10,000 to $50,000. 28 U.S.C. § 1332 (a)–(b) (1982).

[172] *See* Cleburne, 473 U.S. at 466 (a minority of the justices indicated that historically stigmatized groups that have recently gained a measure of legislative attention may have, as a result, lost the protection of rigorous judicial scrutiny of harmful government classification); Lawrence, *Unconscious Racism*, *supra* note 23.

[173] Over 3000 federal class actions were filed in 1975 and just over 600 in fiscal year 1987, constituting a 500% decline. Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. Times, Jan. 8, 1988, at B7, col. 3.

[174] 394 U.S. 332 (1969).

[175] 414 U.S. 291 (1973).

[176] 417 U.S. 156 (1974).

[177] 475 U.S. 717 (1986).

[178] This places the interests of class attorneys and class members in conflict and undermines attorney incentive for bringing public interest class actions.

[179] 42 U.S.C. § 1988 (1982). The Act, passed by Congress in 1976, entitles the prevailing party in a civil rights action to recover its attorney's fees.

[180] As intended, the Act opened the door to civil rights litigation as a means for private enforcement of congressional policy. The Supreme Court, however, contrary to statements of congressional intent, curbed the Act's impact on access by authorizing payment of fees to prevailing defendants where the plaintiff's claim is "unreasonable" even though not made in bad faith. Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). The language of the Act and the committee reports indicate that fees were to be awarded to defendants only upon a much higher showing of "vexatiousness" or bad

plaintiffs who succeed on the merits of their civil rights claims cannot recover fees when damage or injunctive remedies are no longer appropriate due to changes in circumstances after decision on substantive issues.[181]

Novel constitutional positions can no longer be raised in postappeal habeas corpus petitions. Apparently frustrated with the expansion of post-conviction litigation, deemed civil in nature,[182] the Supreme Court in *Teague v. Lane*[183] closed courthouse doors to a class of federal challenges to state convictions. In an attempt to address dual concerns about increases in habeas corpus filings and the extent of retroactive application of new constitutional rules, the Court in *Teague* proscribed prisoners from collaterally attacking their convictions by asserting legal theories that extend or modify existing law.[184]

Overall indicators thus point to two barriers to litigants challenging entrenched social and political arrangements. First, plaintiffs face a growing restriction of entry into the system. Second, they face a decreased chance of receiving a full and

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faith by the plaintiff. *See* Civil Rights Attorney's Fees Awards Act of 1976, S. Rep. No. 1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912.

[181] Hewitt v. Helms, 482 U.S. 755 (1987) (plaintiff who obtains favorable decision on merits of her substantive and procedural due process claims against prison officials denied attorney's fees under § 1988 because, due to appeal delays, injunctive and declaratory relief were no longer necessary and damages were inappropriate). *See also* Marek v. Chesney, 473 U.S. 1 (1985) (civil rights defendant not liable for attorney's fees incurred after a pretrial settlement offer where plaintiff's judgment is less than the offer).

[182] Habeas corpus proceedings are deemed civil even though they usually address underlying criminal convictions. Fed. R. Civ. P. 11 thus applies to habeas corpus filings. *See* United States v. Quin, 836 F.2d 654 (1st Cir. 1988).

[183] 109 S. Ct. 1060 (1989).

[184] As an efficiency measure the ruling makes eminent sense. It will eliminate many filings. With minor exceptions it eliminates problematic twists to retroactivity principles. The ruling is troublesome, however. Coupled with Rule 11, it is likely to deter attorneys from asserting plausible arguments about the injustice of continued incarceration of those on society's extreme margins who were convicted under laws that were ambiguous and have since evolved. *See Quin*, 836 F.2d at 659. *Teague* also appears to be part of an emerging procedural belief structure that accepts restrictions on the assertion of novel theories as principal means of achieving systemic efficiency. *See* Penry v. Lynaugh, 57 U.S.L.W. at 4968 (Brennan, J., dissenting):

> The *Teague* plurality adopted for no adequate reason a novel threshold test that . . . precludes federal courts from considering a vast array of important federal questions on collateral review, and thereby both prevents the vindication of personal constitutional rights and deprives our society of a significant safeguard against future violations.

fair hearing once in the system.[185] A value judgment is discernible: in a system based on efficiency, plaintiffs outside society's political and cultural mainstream asserting marginal claims are expendable. Their participation in governmental process through litigation is of insufficient value to warrant systemic openness. Two prominent federal district court judges have identified a related subtext to the "cheaper and quicker" message of efficiency reforms. Judge Weinstein has observed an "anti-access movement."[186] Judge Carter has gone a step further, suggesting that "doomsday cries of the efficiency mongers mask a hidden agenda, an agenda that seeks to limit access to justice of some rights holders but not others."[187]

Recent reforms are likely to deter accent discrimination challenges such as *Fragante*,[188] denigrating the considerable value of litigation process in those situations.[189] Employers sometimes refuse to hire English-speaking immigrants because of their accent. This is a significant problem of personal livelihood for increasing numbers of permanent resident aliens and naturalized citizens. They learn English as a second language well enough to communicate with English-only speakers, but are denied jobs for which they are qualified because employers are troubled by their foreign accents. The stakes are high for the immigrants. Challenges are exceedingly difficult. Gathering hard factual proof of discriminatory intent is extremely difficult. Employers control most relevant information. The substantive law seems to allow employers to assert their patrons' likely discomfort as a bona fide justification for not hiring.[190] File or refrain from filing?

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[185] In addition to the reforms discussed, the 6-member jury, reduced from 12, and the availability of peremptory juror challenges decrease the probability of minority representation on juries. Fed. R. Civ. P. 48. *See generally* J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels (1977) (discussing the importance and difficulty of achieving fair representation on juries).

[186] Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. Pa. L. Rev. 1901, 1913, 1919 (1989) [hereinafter Weinstein, *Barriers to Justice*] (suggesting that the reforms "may be misguided and shortsighted").

[187] Carter, *supra* note 83, at 2195.

[188] No. 87-2921. *See supra* notes 27–38 and accompanying text.

[189] *See infra* notes 225–246 and accompanying text.

[190] *See infra* note 192.

After considerable research and debate, Fragante filed a Title VII suit seeking both a remedy and a public explanation of the city's actions.[191] Fragante and his lawyers litigated the case through trial and appeal. They lost.[192] The district court found that Fragante had "extensive verbal communication skill in English" but deferred to the city administrator's conclusion that Fragante's accent justified denying him the position as clerk. The Ninth Circuit affirmed, rejecting without serious discussion Fragante's theory that listener preference for nonaccented speech was an inappropriate basis for job denials.[193]

Despite the ultimate judgment, Fragante, his circle of close supporters, and the local Filipino community benefitted from the process of rights assertion. Many Filipinos identified with Fragante's situation.[194] His case became a rallying point for an expanded group concerned about public education on both state and local levels.[195] It attracted people who perceived the case as a reflection of a larger discriminatory attitude that society and the established powers had not seriously acknowledged.[196] It contributed to a revamping of division interview procedures to ensure freedom from cultural bias in future decisions. Fra-

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[191] Fragante's attorneys almost declined to file suit for two reasons: first, lack of litigation resources, which was partially resolved through community fundraising and, second, fear of assessment of attorney's fees and costs if they lost. After careful research, the attorneys concluded that sanctions were not a substantial risk. *See supra* notes 27–38.

[192] The trial court made an equivocal finding that Fragante had a strong accent and that public communication ability was a bona fide job requirement. Curiously, the court did not expressly find that Fragante's accent was such that he lacked the ability to communicate. The Ninth Circuit affirmed without discussing this omission. *Fragante*, No. 87-2921, slip op. 1709, 1719–21. *See Discrimination Ruling Is Felt In Hawaii*, Honolulu Star-Bulletin, July 18, 1989, at A-1, col. 2.

[193] 888 F.2d 591.

[194] Two meteorological technicians prosecuted a similar suit against the National Weather Service for job rejections based on their "pidgin English" accents. *Suit Says Men Rejected Because of 'Pidgin' Use*, Honolulu Advertiser, Sept. 16, 1987, at A3, col. 5.

[195] The case also attracted attention in San Francisco. A support group formed there and raised funds and publicized issues. *See Accent Case Under Appeal*, Philippine News (San Fransisco-San Jose edition), Aug. 17, 1988, at 3, col. 4; *$2,000 Raised in S.F. for Hawaiian Accent Battle*, Asian Week, Aug. 26, 1988, at 11, col. 1; *Fragante Charges Foul in Filipino Accent Case*, Asian Week, Apr. 14, 1989, at 9, col. 1.

[196] Community newspapers provide some indication of community interest. *See, e.g., Fragante Case*, Hawaii Herald, Nov. 20, 1987, at 13, col. 1; *Fragante: A Case of Discrimination?*, FilAm Courier, Mar. 1988, at 14; *Does An Accent Justify Job Bias*, Asian Week, Feb. 26, 1988, at 3; *Filipino Sues After Accent Costs Him A Job*, Honolulu Star-Bulletin, Feb. 6, 1989, A1, col. 5.

gante's case also served as a catalyst for legislative lobbying efforts and stimulated public recognition of the existence of civil rights problems that were not being adequately addressed by government agencies. This contributed concretely to the legislative creation of a state civil rights commission with investigative and enforcement powers.[197]

Significantly, the principal filings in *Fragante* occurred before and during the early stages of efficiency procedural reform. Fragante's lead litigation counsel recently observed that if reformed procedures had been in full effect in 1983, he probably could not have afforded the escalated risk of litigating such a marginal case.[198] He had a strong suspicion that subtle cultural prejudice influenced the decision not to hire, but he had little hard proof before filing. Lowered summary judgment thresholds would have decreased the chance of a full public trial. Moreover, heightened fact pleading requirements and liberally dispensed sanctions for novel but failed theories would have created too great a financial risk for his fledgling public interest firm.[199]

II. A Traditional Values Framework for Evaluating Efficiency Procedural Reforms

Part I concludes that efficiency procedural reforms discourage minority access to courts for the assertion of rights

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[197] Interviews with William Hoshijo, Executive Director and principal attorney, Na Loio No Na Kanaka (Lawyers for the People) (July 15, 1989 and Aug. 23, 1989). According to Hoshijo, the *Fragante* Litigation Support Group later became a political force behind the lobbying effort that resulted in passage of state legislation in 1988 creating a civil rights commission.

[198] Hoshijo stated that if amended Rule 11 had been fully operative and applied in the manner that it has been applied by many courts, his public interest firm probably could not have afforded the risk of filing suit. He knew the suit advanced a novel legal theory and rested upon certain yet to be discovered facts. Former Rule 11 presented no problem, but amended Rule 11 would have. A Rule 11 monetary sanction very likely would have shut down his public interest law firm. *Id.* Prior to filing in 1983, Hoshijo had researched carefully the possibility of an assessment of attorney's fees and had concluded at that time that the risk was nonexistent. *Id.* Fragante, noting procedural obstacles erected since the filing of his suit, including the reordering of burdens of proof of discriminatory intent, commented that "[t]he courts are putting the heaviest burden on the people who have the least resources . . . . The more obstacles you place, the more you discourage people from going through the hassles." Honolulu Star-Bulletin, July 18, 1989, at 1, col. 4.

[199] If that had been the situation, it is likely that there would have been no *Fragante* litigation at all. Thus all the community benefits stemming from the litigation would not have occured. Another illustration of this point, involving an extraordinary situation, is the reopening of Korematsu, 323 U.S. 214.

claims deemed marginal by prevailing law. How should those reforms be evaluated? While there are several illuminating possibilities, this Article adopts the approach of value assessment, examining the impact of the reform process on a range of values linked to court access. This part explores reform in the context of traditional procedural theory and the values associated with that theory.[200]

Part III offers expansion upon and analytic refinements to traditional values analysis, suggesting that the traditional values identified are an incomplete basis of evaluation. By contrast, evolving procedural theory is shown to address the shortcomings of traditional theory and provide a fuller range of values for evaluating efficiency reforms that diminish minority access to courts.

In 1912, Roscoe Pound urged study of the "actual social effects of legal institutions and . . . doctrines."[201] Pound's call for a rejection of classical formalism stimulated nearly eighty years of richly textured writing that endeavored in often conflicting ways to ascertain and explain the origins and effects of substantive law.[202]

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[200] I use "traditional" expansively. There is no one traditional theory. There is no clear line of demarcation between the traditional and modern. Generally, this part distills various theories and views, many of which were themselves innovations, as a basis for comparing recent developments in procedural thinking. "Classical legal thought" is another term that has been used by historians to describe a mode of legal thinking from the 1850's to the 1940's. *See* Kennedy, *Toward an Understanding of Legal Conscious ness: The Case of Classical Legal Thought in America, 1850–1940*, 3 Res. in L. & Soc. 3 (1980); Trubek, *Sociology of Civil Procedure*, *supra* note 92, at 113 ("classical legal thought still influences current thinking about procedure").

[201] Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 Harv. L. Rev. 489, 516 (1912). Pound criticized employment of "the whole energy of our judicial system . . . in working out a consistent, logical, minutely precise body of [precedent]" and suggested that "the life of the law is in its enforcement."

[202] Sociological jurisprudence in the early 1900's, legal realism, post-World War II legal process theory, law and economics, liberal rights and critical theories of the 1970's and 1980's are some of those schools of thought. For an overview, see White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 Va. L. Rev. 999 (1972); *Legal Scholarship: Its Nature and Purposes*, 90 Yale L.J. 955 (1981). Law and society proponents in particular urge use of social science research methods to describe the actual operation of law in society and to ascertain social effects. *See generally* Friedman, *The Law and Society Movement*, 38 Stan. L. Rev. 763 (1986); Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 Law & Soc'y Rev. 529, 567 (1977) (urging scholars to examine the actual impact of law on social groups); Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 Stan. L. Rev. 575, 587 (1984) (researching "what the law does in society").

In contrast, procedural theory sustained comparatively sporadic growth in the period following Pound's suggestion. The adoption of the Federal Rules in 1938 reflected a commitment to inexpensive decisions on the merits, opening a uniform and accessible adjudicatory system to those excluded by the intricacy and rigidity of common law and code pleading regimes.[203] In the next decades, scholars largely eschewed critical inquiry into the theoretical foundations of procedure.[204] This prompted Hazard to observe that the "product of procedural scholarship in the last twenty-five years is conspicuously bare of what might be called the philosophy of procedure."[205]

Ingrained beliefs about neutrality and procedural fairness persisted.[206] Those beliefs had dual roots: first, in a longstanding "drive for procedural uniformity";[207] and, second, in the clean separation of substance and procedure.

One dimension of the drive for uniformity has been identical procedures among courts, that is, uniformity among federal district courts; between state and federal courts; and within each court concerning law and equity issues.[208] Another dimension to uniformity has been the application of a single set of procedures to all cases regardless of substance. Transsubstantive rules are linked to the notion of procedural neutrality. That notion is that uniform procedures do not by their terms favor one type of claim over another or one group over another. They are therefore value-neutral. They can be applied evenhandedly

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[203] *See supra* notes 76–82.

[204] *But see* Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978) [hereinafter Fuller, *Forms of Adjudication*] (originally circulated in the late 1950's); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

[205] *See* G. Hazard, Jr., Research in Civil Procedure 63 (1963) (quoted in Burbank, *The Costs of Complexity* (Book Review), 85 Mich. L. Rev. 1463, 1464 n.9 (1987) [hereinafter Burbank, *Costs of Complexity*]).

[206] Graham, *The Persistence of Progressive Proceduralism*, 61 Tex. L. Rev. 929, 945 (1983). Graham suggests that these notions of uniformity are subconsciously accepted because a "lack of uniformity is a threat to the claim that procedure is a value-free science." *Id.*

[207] *Id.* at 944. *See also* Garth, *supra* note 71, at 169–70 (defining "procedural formalism" as "a system of rigid limits on the information that reaches the decision maker").

[208] Subrin, *How Equity Conquered Law*, *supra* note 80. Subrin and others question whether this type of uniformity is achievable or even desirable. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2044–45 (1989) [hereinafter Subrin, *Emerging Procedural Patterns*].

by neutral judges without reference to competing substantive values and hence are fair.[209]

Substantive norms are viewed as independent of procedural rules. The function of procedure is instrumental. It ensures efficient and neutral resolution of disputes by facilitating the discovery of information and the application of substantive norms to facts. Created by government authority, procedure is litigant-neutral as well as substance-neutral. This view of procedural neutrality reflects a positivist view of law and is consistent with the traditional model of private dispute adjudication.[210] Substantive legal rules are statements of the sovereign reflecting conceptions of private ordering. The judge is an impartial arbiter who rules upon issues formulated and information presented by attorneys for individual parties. The goal of litigation is to return the individual to the status quo as if no transgression had been committed. Participation is individualized rather than representational.[211] Procedure addresses form rather than content. Its

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[209] *See* Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2067, 2074 (1989) (discussing "political neutrality" as a goal and outcome of federal rulemaking). *See infra* notes 248, 260–266 for contrasting views.

[210] Abram Chayes calls it the "traditional model." Chayes, *Role of the Judge*, *supra* note 44, at 1283. Eskridge calls it the "Hobbesian Paradigm." Eskridge, *Metaprocedure*, 98 Yale L.J. 945, 955 n.32 (1989).

[211] In the late 1950's, Lon Fuller also marshalled strong support for the traditional private law model. His widely-read essay on the forms of adjudication argued for a model of adjudication with goals confined to resolution of essentially private disputes between individuals. Fuller, *Forms of Adjudication*, *supra* note 204, at 393–409. Group-based claims, with representative litigants and publicly oriented disputes, polycentric in structure, he maintained, could not be effectively handled by the adversarial system. Courts, as the nonelective governmental branch with an accepted tradition limited to private law adjudication, lacked moral authority to engage in political adjudication affecting interests of nonparties. *Id.* Fuller championed individualized participation. He theorized that "polycentric" problems, characterized by representational participation, are not suited for adjudication because the solutions generated inevitably affect persons who did not actually participate or fairly have their interests represented. *Id.* at 394–95. Owen Fiss has contested Fuller's thesis of individualized participation:

> [T]here is no explanation of why reason requires the kind of individual participation that Fuller insists upon. In structural reform, reason enters the process, not through the arguments of each and every individual affected, but through the arguments of the spokesmen for all interests represented and through the decision of the judge.

Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 42 (1979) [hereinafter Fiss, *Forms of Justice*]. *See also* Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 147–56 (1976) (discussing a "group-disadvantaging" principle).

role is strictly limited "to insur[ing] precision, uniformity and certainty in the judicial application of substantive law."[212]

In many respects, the adoption of the Federal Rules of Civil Procedure in 1938 markedly improved upon existing procedural systems by emphasizing decisions on the merits and by rejecting a formalism enmeshed in technical complexity.[213] In so doing, however, the Rules embraced a formalist notion of the inherent neutrality and fairness of carefully promulgated uniform rules. According to Robert Bone, a "pragmatist" view of procedure in the early twentieth century influenced the structure of the rules.[214] It emphasized convenience rather than abstract theories of rights. It supported enlarged judicial discretion and looked to case management by judges. And it retained a clear dividing line between substance and procedure. The Rules Enabling Act reflects this vision by commanding that the federal rules not "abridge, enlarge or modify any substantive right."[215] Uniform rules were perceived by many as "value-neutral."[216] Indeed, Paul Carrington observes that "political neutrality" was and continues to be a "paramount value" of the Federal Rules.[217]

In the late 1950's, the assumption of procedural fairness gained further support from legal process theory developed by Hart and Sacks. Legal process theory attempted to bridge the gap created by legal realism's forceful rejection of classical

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[212] Bone, *infra* note 214, at 96 (discussing the views of Pound and Clark) and 88 (observing that Clark deemed it "analytically useful [although not conceptually fundamental] to divide procedure from substance, and he constantly insisted on an instrumental relationship between procedure and substantive law").

[213] *See supra* notes 76–82 and accompanying text.

[214] Bone has described two theories underlying major procedural reforms of the nineteenth and early twentieth centuries, each of which embraces a notion of procedural neutrality. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 Colum. L. Rev. 1 (1989). A "right-remedy" theory informed the structure of code procedures. A principal function of procedure was to remedy the disruption of the natural order, defined by natural substantive law, by restoring the injured litigant to the status quo. *Id.* at 98. The theory embraced an instrumental function of procedure. Accepting a clear separation of substance and procedure, it assumed the essential neutrality of adjective law. The second theory is the pragmatist theory.

[215] 28 U.S.C. § 2072 (1982). *See also supra* note 210.

[216] Bone, *supra* note 214, at 115.

[217] Carrington, *supra* note 209, at 2074. The political neutrality of the Rules, in terms of the original intention of the drafters and the effects of the Rules, has been forcefully challenged. *See* Burbank, *Transformation*, *supra* note 114; Subrin, *Emerging Procedural Patterns*, *supra* note 208; Subrin, *How Equity Conquered Law*, *supra* note 80; *infra* text accompanying notes 248, 260–266.

formalism.[218] Realism deconstructed formalist categories and reasoning processes and emphasized scrutiny of values and interests. Legal realism thus blurred the clean divide between substance and procedure. For some, realism portended a system without normative guidance where judges decide disputes according to personal perceptions of the "good life."[219]

Legal process theory accepted significant legislative and executive influence upon private affairs but rejected a moral relativist view of law. In assuming that law could be fair, it focused on process and not on substantive rights.[220] It assumed that fairness was the by-product of rational procedures tailored to institutional characteristics.[221] Institutional competence determined institutional role.[222] The political branches best re-

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[218] Greatly simplified, legal realists studied "legal behavior" and posited that the "law" is a product of human experience, values and goals, not logic, and that legal principles are social constructs that both reflect and guide forms of social interaction. K. Llewellyn, The Common Law Tradition: Deciding Appeals (1960); Singer, *supra* note 75, at 474. Realists exposed the general indeterminacy of rules and focused attention on the goals and social effects of rules as a means of understanding their operation. "Rights" emerged as socially created mechanisms for constraining individual freedom through state force on the basis of value choices. Judicial method constrained judicial process but did not dictate judicial outcomes.

Realist jurisprudence undermined the formalist distinction between private law, based on a self-regulating market free from governmental interference, and public law, based on issues of public concern susceptible to state intervention. It also convincingly dashed the formalist notion that law is fixed according to some natural order and that the law is always applied neutrally and equally, achieving rational outcomes. In place of formalist notions, realists suggested a more "scientific" evaluation of conflicting interests in light of competing values and desired social outcomes. Singer, *supra* note 75, at 502.

A primary criticism of the realists' approach was that it was insufficiently normative, that it was essentially pragmatic and failed to provide meaningful guidance, and that judges were therefore constrained only by their conscience and conception of the social good. The supposed "steadying" influence of "a long-established judicial tradition" itself seemed susceptible to realist critique. Mensch, *The History of Mainstream Legal Thought*, in The Politics of Law: A Progressive Critique 32 (D. Kairys ed. 1982).

[219] L. Kalman, Legal Realism at Yale 121 (1986). *But see* Singer, *supra* note 75, at 471 ("The vision of opinions as nothing but post hoc rationalizations seriously misrepresents what most realists argued. The most convincing legal realists argued that the reasoning demanded by judicial opinions substantially constrained judges.").

[220] *See generally* Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed. 1958).

[221] Legal process theory has been criticized for assuming the inherent capacity of procedure to render just results. While it acknowledged the inadequacy of prerealist formalism with respect to substantive law, it embraced a kind of procedural formalism, which masked the extent of substantive value choices in decisionmaking. *See* Mensch, *supra* note 218, at 30.

[222] Singer, *supra* note 75, at 506.

solved public policy controversies. Courts, armed with litigation procedures, were especially competent to adjudicate factual disputes and render fair decisions for private litigants.

Generally stated, traditional procedural theory tended to focus on individual participation in the judicial resolution of private disputes, to separate procedure from substance, and to link uniform, facially neutral procedures with fairness. The conceptual divide between substance and procedure and the assumption of the fairness of uniform procedures tended to "undervalue the most important type of uniformity—uniformity of result."[223] Scholars relegated inquiries about legal results and social impact to the realm of substantive law.

Traditional procedural values relating to court access are located generally within this setting.[224] Those values are discussed in the remainder of this part as a departure point for evaluating recent procedural reforms. While efficiency analysis links the legitimacy of the litigation process to the inexpensive and accurate application of substantive law to the facts of cases, traditional values analysis roots legitimacy in a broader range of values. Litigation process is legitimized by procedures that ensure the effectuation of individual rights, that recognize the significance of dignity and individual participation in the peaceful resolution of disputes, and that foster a sense of fairness on the part of litigants and the public.

A. Procedure and Effectuation

A principal purpose of procedure is effectuation, that is, procedure is the means through which individuals "are enabled

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[223] Subrin, *Emerging Procedural Patterns*, *supra* note 208, at 2047.

[224] In an influential article proposing free access to courts for indigents, Frank Michelman identified four discrete, yet interrelated, traditional litigation values: dignity, participation, deterrence, and effectuation. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 Duke L. Rev. 1153, 1172–73 [hereinafter Michelman, *Access Fees*]. I have adopted Michelman's general definition of "values." The term is generally synonymous with "ends, interest, purposes." *Id.* at 1172. *See also* Mashaw, *supra* note 61, at 46–47; Subrin & Dykstra, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 Harv. C.R.-C.L. L. Rev. 449 (1974); Summers, *Evaluating and Improving Legal Processes–A Plea for "Process Values"*, 60 Cornell L. Rev. 1 (1974); Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269 (1975).

to get, or are given assurance of having" whatever society "regards as rightfully theirs."[225] "Rights" are statements of relational expectations between individuals, on the one hand, and between individuals and the state, on the other, that are enforceable by state authority. The effectuation value of procedure is realized when procedure facilitates the accurate application of substantive law and enables litigants to enforce their rights. When an individual's rights are enforced, a complementary value of "deterrence" is also furthered.[226]

Efficiency reforms implicitly accept effectuation as the overriding procedural value. As discussed, the touchstone for efficiency is the winner. Those who are likely to effectuate their substantive rights belong in the system. Those who are not, do not. Both efficiency and accuracy are promoted by procedures that excise early on those who are asserting tenuous rights claims.

B. Procedure, Individual Dignity, and Participation

Dignity values reflect concern for the "humiliation and loss of self-respect" that a person suffers when denied entry into the legal system.[227] Dignity is most clearly offended when a person believes that she is the victim of governmental arbitrariness or private abuse and is barred at the courthouse door or forced to participate without assistance or resources.[228] A typical example is the person whose welfare benefits are terminated without explanation and who lacks resources to challenge the termination formally.

Philosophers of varying orientations view individual dignity as the wellspring of a functioning, humane society.[229] Richard

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[225] Michelman, *Access Fees*, *supra* note 224, at 1173.

[226] Deterrence shapes the behavior of rights violators in "ways thought socially desirable." *Id.* at 1154 (noting that deterrence values might also be appropriately labeled "social welfare values").

[227] *Id.* at 1172.

[228] *Id.* at 1173.

[229] Philosophers have long recognized human dignity as a primary moral value of democratic societies. *See* Murphy, *An Ordering of Constitutional Values*, 53 S. Cal. L. Rev. 703 (1980). John Rawls, among others, advanced a theory of justice embodying the notion of personal dignity. He posited that implicit in social contract theory is the

Saphire refers to a sense of well-being derived from the process by which decisions are reached, independent of substantive outcomes, as "inherent dignity."[230] There are two philosophical corollaries to this view. First, fairness in relations between government and the individual cannot be defined solely in terms of outcomes or even in terms of the fact-producing mechanisms upon which those outcomes depend. Rather, the tenor of the interaction itself is important. Second, the individual's perceptions of and feelings about the effects of governmental processes must be taken into account in assessing legitimacy.[231]

Expressing one's views in a public forum links dignity and participation. Participation values reflect an appreciation of "litigation as one of the modes in which persons exert influence, or have their wills counted, in societal decisions they care about."[232] The core supposition is that state coercion must be legitimized not only by acceptable substantive policies, but by political processes that respond to a democratic society's demand that individuals participate in decisions affecting their daily lives.[233] Independent of the results achieved, "the partici-

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view that formation of societies and governments is prompted by a need, basic to all, to preserve individual dignity and autonomy, both moral and physical. J. Rawls, A Theory of Justice (1971). Rawls drew upon John Locke's principle that the loss of freedom from arbitrary power is the loss of the dignity essential to life. *See* J. Locke, An Essay Concerning Human Understanding (1894). This is consistent with the Kantian rejection of society's treatment of the individual as a means, instead of as an end. The government's fair treatment of the individual is a value unto itself; it is a predicate to instilling the feelings of dignity and self-respect essential to healthy social interaction and workable social organization. *See* Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, 18 Nomos 172 (1977).

[230] Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. Pa. L. Rev. 111, 121 (1978).

[231] Recent sociopsychological studies support these suppositions. *See infra* notes 240–243.

[232] According to Michelman, the rudimentary importance of participation values in a democratic society suggests a broad constitutional right of court access. Michelman, *Access Fees*, *supra* note 224, at 1172. *See* NAACP v. Button, 371 U.S. 415, 429–30 (1963) (minority group association for the purpose of legal challenges may be a form of political expression protected by the associational component of the first amendment).

[233] Mashaw, *supra* note 61, at 30. Pincoffs aptly highlights this point:

> Community consists in this: that no one can rightly complain of being used by another . . . . The obvious safeguard against such use is that the person enter meaningfully into the consultation about what is to be done to him, for him and with him. Revelation to him of the reasons for the proposed action, and his participation in the assessment of those reasons are then necessary condi-

patory roles provided for in legal processes . . . afford" a desired "measure of self-determination."[234]

Viewed from the perspective of an individual like Fragante who is refused a job due to his accent and who may be later deterred from bringing suit to challenge the social norms underlying that refusal, efficiency reforms deprive him of his only meaningful forum for "having his will counted." His loss of an employment opportunity is compounded by society's failure to afford him a chance to participate in the creation and enforcement of legal understandings giving rise to that loss.[235]

Efficiency reforms that restrict court access for plaintiffs asserting marginal claims or novel legal theories thus tend to further effectuation values but disserve values of individual dignity and participation. In so doing, efficiency reforms draw into conflict traditional views of justice for individuals. From a utilitarian perspective, some indignity suffered by a minority of the populace is an unavoidable and tolerable result of system shrinkage in the interest of efficiency. From a perspective of justice that defines what is "right" in terms of individual autonomy and freedom, the indignity resulting from the exclusion of individuals with marginal claims is unacceptable.[236] Traditional procedural values analysis highlights the conflict but does not provide clear means for resolving it.

C. Procedure and Peaceful Resolution of Disputes

Traditional procedural analysis values "inclusion" provided that participation is peaceful. Peacefulness in the resolution of

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tions of meaningful consultation—consultation that is not merely a blind for action that takes no account of him, his interest, his desires.

Pincoffs, *supra* note 229, at 179–80. Fuller links the moral legitimacy of adjudication directly to the opportunity of the individual to participate in the process. Fuller, *Forms of Adjudication*, *supra* note 204, at 394–95.

[234] Summers, *supra* note 224, at 22.

[235] The emphasis on the individual in traditional values analysis ignores to an extent group participation values, which are also significantly impacted by efficiency reforms. *See also* Fuller, *Forms of Adjudication*, *supra* note 204.

[236] *See* Rawls, *supra* note 229. Rawls argues that the collective good cannot take precedence over the autonomy and freedom of the individual. "Each person possesses an inviolability founded on justice that even the welfare of society cannot override . . . . The rights secured by justice are not subject to political bargaining or to the calculus of social interests." *Id.* at 3–4.

In important respects, traditional dignity and participation analysis, with its focus on the individual, underplays the effects of procedural reform upon social groups. *See infra* notes 247–287 and accompanying text.

disputes is something "[m]ost people in Western societies take . . . for granted" because "peace and repose are simply preferable to strife and tension."[237] Of course, some "peaceful" procedures are violent and oppressive in consequence; for example, the death penalty. And the civil rights movement has demonstrated that agitation and resistance are sometimes more effective than resort to peaceful but biased procedures. Nevertheless, the notion persists that in a "well-ordered society" a routinized peaceful process is "generally preferable even when its results are somewhat less good than those realizable" through other means.[238]

Efficiency procedural reforms that diminish court access for public interest and minority litigants might be viewed as encouraging forcible protest and therefore disserving the value of peacefulness in dispute resolution. Overt public resistance, however, seems an unlikely generalized consequence of procedural reform, especially in light of the subtlety of the reforms, their apparent neutrality, and the incremental nature of their exclusionary effects. Nevertheless, collective alienation and frustration over time, without peaceful outlet, can be channeled by specific events into violence against perceived oppressors. Protest outside the courts, attributable to lack of court access in a given instance, is a potential catalyst for explosive behavior rooted in simmering group frustration. Forcible protest is encouraged, or at least not discouraged, by reforms when groups perceive that their grievances are not even likely to be addressed let alone redressed by those with decisional power.

D. Procedure and Citizen Assent

A peaceful and orderly adjudicatory system may still lack political legitimacy if "it does not have the assent or acquiescence of citizens."[239] In principle, assent may be inferred from a citizen's acceptance of societal benefits or from his representative's participation in the formation and operation of the dis-

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[237] Summers, *supra* note 224, at 22–23.

[238] *Id.*

[239] *Id.* at 21. *See generally* J. Habermas, Legitimation Crisis (T. McCarthy trans. 1975) [hereinafter Habermas, Legitimation Crisis] (discussing criticisms of the legal system and its crisis of legitimacy).

pute resolution system. In practice, sociopsychological studies indicate that perceptions of procedural fairness are essential to citizen assent. E. Allen Lind and Tom Tyler's recent research indicates that a litigant's sense of justice is determined as much, if not more, by perceptions of procedural fairness than by substantive results.[240] Laurens Walker, Lind, and John Thibaut's study similarly indicates that for individual litigants, generally desirable ends do not justify undesirable means, but procedural fairness greatly enhances acceptance of a wide range of outcomes.[241]

According to these studies, perceptions of procedural fairness are linked to participants' opportunities for expressing personal views to attentive authority.[242] Accessibility is key. By reducing cost and delay, efficiency reforms may enhance the perception of procedural fairness for those allowed to participate. Less expensive, more responsive procedures benefit participants. Because the reforms appear hospitable to mainstream claims, many are likely to perceive reforms as enhancing procedural fairness. For those deterred from participating, however, reforms undermine beliefs in systemic fairness.

Is it acceptable to enhance perceptions of fairness for the majority in a manner that fosters perceptions of unfairness for a minority?[243] If the majority vastly outnumbers the minority, the system is likely to function more efficiently and overt public resistance is unlikely.[244] Utility theory therefore suggests that the trade-off is acceptable. Social contract theory suggests, however, that the legitimacy of the process is based on the assent of all citizens, especially of those with minimal influence upon the structure and operation of the system.[245] Again, traditional values analysis highlights the conflict but does not resolve it.

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[240] Lind & Tyler, The Social Psychology of Procedural Justice 207–15 (1988).

[241] Walker, Lind & Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 Va. L. Rev. 1401, 1416–17 (1979).

[242] Lind & Tyler, *supra* note 240, at 207–10.

[243] The question is useful because it poses the issue within a utilitarian framework seemingly adopted by some reformers. The question is oversimplified because it assumes that the majority will define its interests and the larger social good without reference to the potentially conflicting interests of minorities.

[244] *See supra* notes 237–238 and accompanying text.

[245] Rawls, *supra* note 229 (theorizing that differential treatment in terms of distributive justice can only be justified if it works to the benefit of society's disadvantaged and that the inviolability of the individual precludes any utilitarian preference for ig-

Viewed broadly, efficiency procedural reforms both enhance and detract from systemic legitimacy. They most clearly further effectuation values by enabling participants to get "what is rightfully theirs." While mainstream claimants realize the benefits of efficiency improvements, marginal claimants are likely to perceive the system as increasingly inhospitable to their grievances. The value of individual participation along with the values of peaceful dispute resolution and dignity argue for increasing court access particularly for individuals without other meaningful avenues of protest.

When recent procedural reforms are subjected to an efficiency analysis, a mode of analysis criticized for failing to consider a wide range of relevant values, the reforms seem sensible if not salutary.[246] When subjected to traditional multivalue analysis, the appropriateness and desirability of the reforms are called sharply into question.

III. Developments in Procedural Theory

This section suggests that traditional values analysis is itself incomplete. Developments in procedural theory have underscored the shortcomings of traditional theory including its narrow emphasis on the individual and on private dispute resolution; its separation of substance and procedure; its assumption of procedural neutrality and fairness; and its refusal to examine social effects. Recent developments in theory offer a range of procedural values in addition to efficiency that are of special relevance to minorities seeking court access and that enhance our evaluation of procedural reforms. Some of those values are analytic refinements to traditional values. Some are drawn from evolving procedural theory, rights theory, feminist philosophy and minority litigation experience. These may be viewed as new values in the context of procedure. Collectively, they support the proposition that accessible courts for minorities asserting

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noring the individual to further the common good). *See supra* note 236. In addition, the Kantian emphasis on individual autonomy leads to a conclusion of moral legitimacy only if dignity is preserved for each affected person, raising the larger issue of the primacy of the individual "right" over the collective "good." *See* M. Sandel, Liberalism and the Limits of Justice (1982).

[246] *See supra* note 224.

marginal rights claims are integral to a functioning, humane legal system in a society committed to democratic ideals.

In the last fifteen years, the language of procedure has undergone dramatic evolution. Descriptions of new dispute resolution systems, analyses of altered procedures and explanations of expanded foundations of adjudication have developed new terminology. The language of procedural theory has also changed. Reflecting a shift in the scope of inquiry, the language of philosophy, economics, psychology and political science now appear in procedural discourse.[247] Recent scholarship stresses meaningful interpretation of procedural rules through inquiry into the social contexts of rule formulation and application, rejecting traditional notions of procedure as self-contained, neutral, and internally consistent.[248] It examines values embraced by various structures of procedure,[249] yielding three general developments relevant to the present inquiry.

A. Rejecting the Notion of the Autonomous Litigant

First, traditional theory's tight focus on the autonomous litigant—reflected in concern about the effectuation of individual rights, the individual's perception of fairness, individual dignity, and individual participation—has been broadened to encompass the impact of procedure on social groups. The litigant is no longer objectified as a necessarily "fully constituted, self-contained actor capable of autonomous choice."[250] The litigant's relations with people, groups, and institutions are essential to an understanding of the nature of the dispute and the rights asserted. Scholarship has explored the community-building as-

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[247] *See* Eskridge, *supra* note 210, at 949 n.23 (compiling a list of "notable examples of interdisciplinary borrowing").

[248] *See* Burbank, *Costs of Complexity*, *supra* note 205, at 1472–74 (1987); Eskridge, *supra* note 210, at 949 (we "cannot understand the Rules without understanding their interrelationship with social and economic oppression, human psychology and economic incentives"); Cover, Fiss & Resnik, Procedure (1980).

[249] Two influential books examining structures of procedure are R. Cover & O. Fiss, The Structure of Procedure (1979) and the casebook, Cover, Fiss & Resnik, *supra* note 248. For an insightful critique of the latter, see Eskridge, *supra* note 210.

[250] Trubek, *Sociology of Civil Procedure*, *supra* note 92, at 111, 119–21.

pects of rights assertion and law.[251] The equal protection doctrine's emphasis on differential power in group relations and the marked increase in public law litigation, including representational suits, have impelled procedural recognition of the status of groups.[252] "Groups" do not refer to voluntary organizations but to "attribution or status groups, in which membership arises from biology, heritage, personal trait or social position."[253] Membership in these groups "carries a baggage of socially constructed meaning beyond the brute factual reality of the identifying traits."[254]

Inquiry has become increasingly sensitive to the effect of litigation process on group relations characterized by an imbalance of power. Sometimes individuals are aggrieved because of their membership in a group disfavored by members of mainstream society. The qualified African-American employee denied a promotion because of the employer's policy of promoting only whites asserts a rights claim for herself and on behalf of other nonwhite employees. The affront is group directed. The remedy may yield group benefits. Procedural theory unequivocally recognizes group-based social behavior and the appropriateness of corresponding group-based rights litigation.

The evolution is most noticeable with respect to participation values. Fuller's commitment to individualized participation is generally recognized as outdated.[255] He argued in the 1950's

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[251] *See supra* notes 235–236. *See also* Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, 28 Nomos 71, 92 (1986) (a right asserted, "however much it may be a claim to respect of a distinct person, is, equally fundamentally, a claim grounded in human association"); Minow, *Listening the Right Way* (Book Review), 64 N.Y.U. L. Rev. 946, 956 (1989) [hereinafter Minow, *Listening*]. Theorists such as Rawls build a system of justice upon each individual's freedom and autonomy. Society's powerful cannot act in a just manner as long as they denigrate the interests of those individuals less powerful to further their own interests. *See* Rawls, *supra* note 229. Sandel and others have refuted the notion of the disembodied individual, arguing that the individual is constituted by her relations to communities to which she is bonded. Communitarian relations, in the broadest sense, are integral to notions of justice. Sandel, Liberalism and the Limits of Justice, *supra* note 245.

[252] *See generally* Lawrence, *supra* note 23.

[253] Michelman, *The Meanings of Legal Equality*, Harv. BlackLetter J. 24, 27 (Spring 1986) ("Equality comes clearly into its own as a distinct constitutional norm . . . when we envision society as composed not just of atomic individuals but also, in part, of groups that in turn are composed of individuals.").

[254] *Id.*

[255] *See generally* S. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987); Chayes, *Role of the Judge*, *supra* note 44.

that representational suits are inappropriate for adjudication because the solutions generated inevitably affect persons who have not actually participated in the litigation.[256] The more generally accepted view now is that in current group-based litigation, "spokesmen for all interests" represent the interests of non-party individuals.[257]

B. Challenging Assumptions of Neutrality

Second, scholars and jurists generally acknowledge now that procedure is neither value-free nor a science.[258] In creating or reforming a procedural system, people bring to bear particular viewpoints not only about specific procedural rules but also about substantive issues and fundamental purposes of adjudication. These viewpoints shape their sense of a system's appropriate scope, costs and benefits, which affects their structuring and operation of the system. This in turn shapes the system's substantive impact.[259]

Uniform rules of procedure are thus no longer viewed as inherently substance-neutral or litigant-neutral in operation.[260] Instead, the line between substance and procedure has blurred. In their influential book, Robert Cover and Owen Fiss address

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[256] Fuller, *Forms of Adjudication*, *supra* note 204, at 394–95.

[257] Fiss, *Forms of Justice*, *supra* note 211. Fiss, *Groups and the Equal Protection Clause*, *supra* note 211, at 148–54 (discussing a "group-disadvantaging" principle).

[258] *See* Graham, *supra* note 206, at 945. The debate is by no means over. Some of it has been acerbic. Carrington's description of the Rules Enabling Act's "aspiration of political neutrality" and his defense of transsubstantive rules, *see* Carrington, *supra* note 209, at 2067–87, has met with strident criticism. Burbank states that "Professor Carrington is alert to the costs of departing from the appearance of 'political neutrality' but deaf to the costs of . . . procedural subterfuge." Burbank, *Transformation*, *supra* note 114, at 1935. Burbank also argues that substance-specific procedures and empirical investigation into effects are an "anathema" to Carrington's view of neutrality because the former attracts political attention and the latter produces "data on the experience under the Rules [that] may cause organized groups to realize that they have a stake and hence to regard the 'neutral' rule as a legitimate object of political interest." *Id.* at 1936.

[259] *See* Subrin, *Emerging Procedural Patterns*, *supra* note 208, at 2046 (procedural rules do not "work in a vacuum . . . . The habits and customs of the bench and bar, the procedural rules, and the economic, social and political agendas of the lawyers, clients, judge and other court personnel interact with one another"); *see also* Subrin, *How Equity Conquered Common Law*, *supra* note 80, at 966.

[260] Subrin's research indicates that procedural reform has always had a substantial political dimension. *See* Subrin, *How Equity Conquered Common Law*, *supra* note 80, at 909–1002 (documenting the political underpinnings of both the Field Code and the Federal Rules).

valuing process and the interdependence of substance and procedure.[261] Procedural form and substantive results are at times inextricably bound.[262] Procedural discretion is viewed as a potential "instrument of power."[263] Indeed, the Supreme Court has recently acknowledged that "rules of procedure have important effects on substantive rights of litigants."[264] A rule structured to deter all frivolous filings may be neutral by its terms and nevertheless partial in its effects. Certain types of potential litigants may be more severely impacted because their social situation generates disproportionate numbers of claims deemed frivolous by current norms.[265]

In critiquing the procedural system, we therefore ask: who formulates the rules?; who interprets and applies them?; who

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[261] R. Cover & O. Fiss, *supra* note 249. *See also* Cover, Fiss & Resnik, Procedure, *supra* note 248.

[262] As a result, momentum has gathered for the creation of "substance-specific" or non-transsubstantive procedures. *See, e.g.*, Subrin, *Emerging Procedural Patterns*, *supra* note 208, at 2042.

[263] Burbank, *Costs of Complexity*, *supra* note 205, at 1471. To fashion rules of sufficient generality to encompass all cases, the Federal Rules scheme has vested considerable discretion in trial judges. This has enabled judges to "do justice" in many instances. But wide-ranging judicial discretion over pleadings, joinder, discovery, and settlements, coupled with open and costly discovery controlled by attorneys, has also transformed procedural rules into potential "instruments of power." *Id.* This power is wielded by judges and litigants. How this power is exercised by judges in deciding close cases depends upon the extent of their allegiance to broadly framed systemic constraints (such as precedent and adherence to perceived "purposes" of the Rules) and to personal notions of how judges should think about the interests involved and the values at stake. *See* Yamamoto, *Case Management*, *supra* note 43, at 416.

[264] Mistretta v. United States, 109 S. Ct. 647, 665 (1989) (footnote omitted). The notion of procedural influence on substantive outcome challenges traditional assumptions and raises descriptive and normative questions. To what extent does procedure undermine formal substantive law? Has substance-sensitive procedure created unpredictability in the process? How should procedural influence be viewed normatively? *See* Cover, Reading the Rules: Procedural Neutrality and Substantive Efficacy, 84 Yale L.J. 718 (1975).

[265] Judge Carter recently observed that Rule 11 has been applied in a manner evincing "extraordinary substantive bias." Carter, *supra* note 83, at 2192. *See* Subrin, *Emerging Procedural Patterns*, *supra* note 208, at 2050 ("many individual procedural rules or clusters of rules have an inherently political aspect, in that they favor or disfavor types of litigants"); Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974).

Burbank suggests that once we accept the non-neutral effect of procedural rules, our task is "to be candid in describing that impact . . . and in describing the purposes of the . . . rules." A system is not dysfunctional because its mechanisms require value choices. Danger lies not in the reality of value choices but in the formalistic refusal to acknowledge their influence in the process. The concern is that "substantive policy choices will be buried, a concern that implicates . . . democratic values." Burbank, *Costs of Complexity*, *supra* note 205, at 1473. For a critique of the procedural formalism implicit in legal process theory, see *supra* note 221.

benefits?; who is harmed?; what substantive values are implicated?; how does the system's treatment of a dispute transform the parties' and the public's perceptions of substantive rights?; what are case-specific effects?; and what are long-term cumulative consequences, particularly with respect to group relations? These and related questions signal increasing inquiry into a "critical sociology of civil procedure."[266]

C. Acknowledging the Role of Adjudication in the Development of Public Values

Third, current procedural theories acknowledge the contribution of litigation procedure to the development and articulation of public values. In contrast, traditional theory emphasized procedures designed to resolve disputes between private parties.[267] Recent scholarship criticizes the traditional private law model of adjudication as anachronistic. It fails to account for a significant public law dimension to adjudication that arises out of the structure of a postindustrial, multicultural democratic society.[268] Although scholars differ with respect to theoretical

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[266] *See* Carrington, *Foreword: The Scientific Study of Legal Institutions*, 51 Law and Contemp. Probs. 1, 4–6 (1988) [hereinafter Carrington, *Scientific Study*]. As early as the 1920's, realists inspired considerable empirical research into legal institutions. Intense scrutiny of the qualitative effects of procedure, however, is a relatively recent phenomenon. The sophistication and acceleration of empirical study of civil procedure in recent years can be linked to developments in procedural theory, the "maturation of social science," and enlarged institutional capacity. *See* Trubek, *Sociology of Civil Procedure*, *supra* note 92.

[267] *See supra* notes 225–226 and accompanying text.

[268] Beginning with Chayes' 1976 article on the emergence of public law litigation as a distinct mode of adjudication, the role of courts in social change has been debated. Chayes, *Role of the Judge*, *supra* note 44, at 1283–84.

Cases of public importance have been adjudicated by courts throughout history, and the Supreme Court has made pronouncements of immense public significance since its inception. A public dimension to adjudication has thus always existed. "Public law litigation" is something distinct, however. According to Chayes and others, its emergence as a model of litigation that has impacted significantly upon the daily functions of courts is marked by greatly increased numbers of filings seeking legal and equitable remedies by an expanded array of claimants raising issues of public concern in a considerably widened field of subject matters. *Id.* Ethnic minorities, women, people with disabilities, homeless people, and environmentalists, among others, have challenged government practices and social arrangements according to newly recognized legislative policies and evolving constitutional doctrines.

The private law model explained adjudication for a social and political setting markedly different from American society of the last 35 years. It was a setting without an encompassing "regulatory welfare state." *See* S. Breyer & R. Stewart, Administrative

foundations, and some argue that less judicial involvement in public law matters is desirable,[269] they generally agree that the purpose of adjudication has evolved into "something more than dispute resolution among individuals about private matters."[270] Public law litigation seeks to influence future institutional behavior[271] and often involves "a struggle among various conceptions of what solution . . . [is] in the public interest, not just a battle among private interests."[272] Rather than attempt to recapture the status quo as does private law litigation under traditional theory, public law litigation seeks to "transform relationships in a publicly desirable way."[273]

The public law dimension to adjudication builds upon traditional political theory embracing a separation of powers ideal. That political theory is concerned with the potential for oppression of the powerless inherent in the pure form of majoritarian rule.[274] One function of the courts is to hold government's elec-

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Law and Regulatory Policy 1, 28 (2d ed. 1985). Citizens did not charge that government bureaucracies had been "captured" by the businesses they regulated, failing to protect the beneficiaries of regulatory programs. *See* R. Fellmeth, The Interstate Commission Omission, The Public Interest, and the I.C.C. (1970); T. Lowi, The End of Liberalism (1969). Individuals rarely sued private businesses to hold them accountable to public standards or government agencies for their own failures and excesses. The setting for the private law model also did not reflect litigation needs of an established "welfare and social services state." S. Breyer & R. Stewart, *supra*, at 36. That era was also unfamiliar with the kind of civil rights activism that indelibly marked the late 1950's through 1970's. That activism strategically blended marches, lobbying, and litigation and resulted in legislation that recognized public rights of minorities and authorized private suits to enforce social policies.

[269] *See, e.g.*, Posner, Federal Courts, *supra* note 48.

[270] Eskridge, *Metaprocedure*, *supra* note 210, at 986.

[271] Fiss, *Forms of Justice*, *supra* note 211. This contrasts sharply with the private law model. The private law model's implicit premise is that "public law" disputes about appropriate changes to the status quo, including challenges to government action, are to be resolved by overtly political executive agencies or legislatures. Courts are not competent to rule on such matters and, as the ostensibly nonpolitical branch of government, lack legitimizing authority to do so. *See* Hart & Sacks, The Legal Process, *supra* note 220.

[272] Eskridge, *supra* note 210, at 957.

[273] *Id.* at 958.

[274] One traditional view of minority rights is steeped in political theory about the proper balance between majoritarian political processes and individual liberties. The elective branches of government, responsive to political constituencies, enact and enforce laws for the general good. Individual interests are subordinated unless they entail liberties deemed essential to democracy by the American polity via the Constitution. Majoritarian processes pose an inherent risk to those in the minority. Minorities, by one general definition, *see* Ely, *supra* note 60, lack political clout and the capacity to form ready coalitions to acquire influence to ensure fair treatment by those in power.

According to this view, the judiciary is the "bastion of individual rights" and the

tive branches accountable to constitutional standards and protect "discrete and insular minorities" from intemperate majorities.[275] Especially where the political will of the majority encourages restriction of minority liberties, an accessible judiciary furthers societal interests and, in particular, those of the minority, by providing a formal public forum for testing government conduct according to constitutional ideals.[276] Rights assertion is the mechanism for triggering judicial scrutiny.[277]

This separation of powers concept acknowledges the practical shortcomings of the interest group model of government decisionmaking, which argues against judicial intervention in public law matters.[278] The hypothetical marketplace of ideas results in truly representative outcomes only if decisionmakers are looking singularly for ideas. In the crowded, tumultuous political world, however, decisionmakers often are looking also to elicit and maintain political support from powerful constituencies. Those proponents of ideas backed by little constituent

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provider of "much-needed protection against arbitrary governmental action." Reinhardt, *supra* note 170, at 967. This view emanates from a rejection of what Hart calls moral populism—that "democracy entails acceptance of the view that the majority have a moral right to dictate how all should live." H.L.A. Hart, Law, Liberty and Morality 54 (1963). The central flaw of moral populism, according to Hart, "is a failure to distinguish the acceptable principle that political power is that entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted." *Id.* A political minority's only means of resistance through governmental process may be the judicial system.

[275] According to former Chief Justice Stone's formulation of the judicial role vis-a-vis minorities in footnote four of United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938), "discrete and insular minorities," due to their exclusion from political processes, must resort to the court for protection from intemperate majorities—hence the justification for heightened judicial scrutiny. For insightful analysis of footnote four, see Cover, *Judicial Activism*, *supra* note 59. *See also* Lawrence, *Unconscious Racism*, *supra* note 23. For criticism of the theoretical foundations of footnote four see Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985) (examining the moral legitimacy and efficacy of careful judicial review); Brilmayer, *Carolene, Conflicts and the Fate of "Insider-Outsider"*, 134 U. Pa. L. Rev. 1291 (1986).

[276] *See* Hart, *supra* note 274, at 86 ("[N]o one should think even when popular morality is supported by an 'overwhelming majority' or marked by widespread intolerance, indignation and disgust, that loyalty to democratic principles requires him to admit that its imposition on a minority is justified").

[277] "The vindication of the rights of the poor and the powerless, those most in need of government protection" has been the "historic function" of the federal judiciary. Reinhardt, *supra* note 170, at 968.

[278] Eskridge, *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1014 (1989) [hereinafter Eskridge, *Statutory Interpretation*] (the "optimistic pluralism" concept "leaves the selection of overall values to the legislature" with conviction that legislative choice among competing interests will "generally produce . . . good policies").

power have only their ideas to offer in a market that values much more. As a result, those without substantial access to power are ineffectual in the legislative and bureaucratic realms. Instead, they seek court access.

Rooted in the separation of powers concept is the idea that a function of adjudication is to "protect public rights."[279] The judicial process is viewed as "an effective mechanism for furthering societal interests through the enforcement of the rights of aggrieved individuals."[280] It permits "ad hoc application of broad national policy in situations of limited scope."[281] Whether a government hiring scheme is discriminatory, a county's electoral structure constitutes gerrymandering, or welfare benefits have been improperly terminated, all involve disputes about "rights" of both the individual directly involved and the group indirectly affected. Individual litigants are deemed private attorneys general attempting to vindicate societal interests reflected in constitutional and legislative policies.[282]

This concept assumes a procedural system hospitable to debate about the existence, scope, and enforcement of public rights.[283] It rejects as unrealistically limited the traditional model's focus on private dispute resolution. The added administrative burdens on courts and costs for institutional defendants are deemed acceptable because they serve the traditional values of deterring rights violations and enhancing popular participation in the process.[284]

In addition to resolving disputes about the enforcement of specific public rights, adjudication is also viewed as a "process

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[279] *See* Eskridge, *supra* note 210, at 961 ("The Cover, Fiss and Resnik thesis is that procedural rules should be tailored to protect public rights.").

[280] Chayes, *Role of the Judge*, *supra* note 44.

[281] *Id.*

[282] City of Riverside v. Rivera, 477 U.S. 561 (1986) (Brennan, J., concurring).

[283] The Cover, Fiss and Resnik casebook is viewed as embodying a perspective that judicial choices "must often be evaluated by standards of public justice, and not by private convenience or mere efficiency" and that "when public rights are involved . . . courts have an obligation to mold procedural requirements to meet public needs." Eskridge, *supra* note 210, at 959–60.

[284] *See supra* note 226. Reflecting this perspective, Justice Stevens in Talamani v. All-State Ins. Co., 470 U.S. 1067, 1071 (1985) (Stevens, J., concurring), sharply rebuked judges with a fast punitive hand, noting that "freedom of access of the courts is a cherished value in our democratic society . . . . There is, and should be, the strongest presumption of open access to all levels of the judicial system."

by which we develop and articulate public values."[285] Fiss suggests that this is an element of traditional theory—that a function of adjudication always has been to give "concrete meaning and expression to values embodied in an authoritative legal text."[286] He recognizes, however, the emergence "within recent decades [of] a new form of constitutional adjudication" aimed at restructuring "organizations that threaten [public] values."[287]

These developments in procedural theory provide the basis for the reformulated values framework offered in the next section.

IV. A Reformulated Values Framework for Evaluating Efficiency Procedural Reforms—Recognizing the Value of Accessible Courts for Minorities Asserting "Marginal" Rights Claims

As discussed, the emphasis of recent procedural reforms on economic efficiency has tended to obscure other procedural values. Cost reduction reforms have focused inquiry narrowly on whether claims are meritorious under prevailing substantive law. The implicit message is that meritorious claims belong in the system; those that appear likely to fail do not. Hence, procedural reform has been aimed at pre-entry and pre-trial screening. This singular emphasis, however, ignores or at least trivializes other procedural values. It tends to ignore several of the traditional values discussed earlier. More important, it excludes consideration of procedural values of particular relevance to minorities asserting marginal substantive rights claims.

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[285] *See* Fiss, *Forms of Justice*, *supra* note 211. Eskridge has formulated a useful definition of public values. They are "legal norms and principles that form fundamental underlying precepts of our polity—background norms that contribute to and result from the moral development of our political community. Public values appeal to conceptions of justice and the common good." Eskridge, *Statutory Interpretation*, *supra* note 278, at 1008.

[286] Fiss, *Foundations of Adjudication*, *infra* note 346. Sources of public values are authoritative texts (the Constitution and statutes) and "interpretative communities." The latter is comprised of the legal community (judges, lawyers, and legal scholars) and a host of other nonlegal communities (politicians, educators, workers, and clergy, among others).

[287] *Id.* at 121.

Theoretical developments in rights analysis and feminist philosophy[288] have stimulated inquiry into the process of rights assertion by historically disadvantaged social groups. That inquiry, set in the context of developments in procedural theory just discussed and minority litigation experience, has suggested additional or reformulated procedural values linked to court access.[289] This section endeavors to cast these procedural values in a framework that facilitates a more complete evaluation of efficiency reforms. This framework encompasses the values of empowerment, including autonomy, community-building, and group mobilization; communication of group voice and the negotiation and renegotiation of public values; effectuation of the separation of powers ideal in the context of majority and minority group relations; and the quest for decency. While other values can be identified,[290] this section discusses only those that

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[288] *See* K. Ferguson, The Feminist Case Against Bureaucracy (1984) (observing that bureaucratic structures reflect the dominant/subordinate power relationship of men and women and arguing that bureaucracy should be replaced by an organization system based upon women's perceptions and skills); MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 Signs, J. Women Culture & Soc'y 635 (1983); Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. Rev. 613, 624–28 (1986) [hereinafter Matsuda, *Liberal Jurisprudence*] (a feminist critique of Rawls, arguing that human nature encompasses group harmony and cooperative, supportive goals, and not selfish, individually-motivated behavior); Minow, *"Forming Underneath Everything that Grows": Toward a History of Family Law*, 1985 Wis. L. Rev. 819 (arguing that women's experiences in traditional family roles allow them to approach governance in other social roles from a family-oriented perspective, rather than an individually-based one); Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. Rev. 589 (1986) (urging that rights discourse only be used as one element to affirm collective identity, and that true social change must rely upon a dialectical sensibility of rights and politics).

[289] Some recent scholarship might be criticized for assuming that similar values of rights assertion extend across all types of claims and cases. *See, e.g.*, Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 Harv. C.R.-C.L. L. Rev. 9, 42 (1989) (in an insightful essay, generalizing broadly about the effect of rights assertion for African-American women). Different situations implicate values of litigation process differently—some directly, some not at all. Thus the discussion in this section does not argue that all cases, or even all minority rights claims, implicate in meaningful fashion the values discussed.

The values discussed are linked intensely to at least one particular category of minority filings—minority rights claims directly affected by efficiency-based procedural reform. As discussed, values of process are particularly significant amidst political dissonance about rights when minorities assert claims deemed marginal by substantive law but which nevertheless reflect developing minority group concerns about fairness and equality.

[290] For example, although the discretionary structure of procedural rules may allow for subtly biased exercises of power, formal procedure does tend to constrain clear

assist in the evaluation of recent efficiency reforms and their impact upon court access.

A. Procedure and Empowerment: Personal Autonomy, Community-Building and Group Mobilization

Litigation of some rights claims contributes to the empowerment of subjugated groups.[291] Stigmatized social groups often lack not only immediate access to political power, but the internal cohesion and strength to organize and develop group voice. Procedure hospitable to minority rights claims is one important aspect of a process for developing internal group strength and external group power. One can think of this empowerment value as comprised of three related aspects: personal autonomy; community-building; and group mobilization.[292]

1. Autonomy

Recent inquiry into concepts of personal autonomy suggests that the "self is not a natural entity independent of social relations, but, rather, is created through social practices, or dis-

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abuses of government authority by judges and limit overt expressions of bias by private parties. *See* Kennedy & Minow, *Thurgood Marshall and Procedural Law: Lawyer's Lawyer, Judge's Judge*, 6 Harv. BlackLetter J. 95, 99 (1989) ("respect for procedural rules, independent of their substantive impact in a given case, can guard against abuses committed by officials in the name of the law"); *see also* Delgado, *Risk of Prejudice*, *supra* note 93 (examining the value of formal litigation procedure for minority claimants).

[291] "Empowerment" is an apt term because minorities, by general definition, lack the power of those in the mainstream whose actions and perceptions often determine how minorities are labeled and treated. *See* Scales-Trent, *supra* note 289; Schneider, *supra* note 288, at 625, 642; Williams, *supra* note 59, at 431.

[292] Of course, these aspects of empowerment are not realized in all cases of rights assertion. Some observers note that rights litigation tends to create an artificial sense of community that is mistaken for genuine community. *See* Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 Tex. L. Rev. 1563, 1577 (1984) (cautioning about the illusion of genuine community created by temporary political coalitions). Others point to a tendency of rights litigation to destroy collectiveness, creating conflicts that increase the gap between courts and minorities and between mainstream and minority litigants. Still others see rights litigation as diverting limited minority capital away from political arenas where it might be most productively expended. *See, e.g.*, Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984). These dimensions to rights assertion are viewed as enervating rather than empowering. They point to the dual potential of rights assertion, which is discussed in *infra* notes 358–388 and accompanying text.

courses."[293] Courts open to minorities can contribute to the development of personal autonomy. For some people, the act of publicly asserting the entitlement to be taken seriously enhances a sense of self-worth.[294] For others, it means transformation from being solely "other-concerned" to also being self-concerned.[295] For still others, rights assertion helps overcome a sense of privatization and subordination.[296] Through rights assertion,[297] the "'private' and 'public' worlds become inextricably linked."[298] Viewed in these ways, the enhancement of personal autonomy through litigation is rooted in the traditional value of individual dignity.

2. *Community-Building*

A developing view of minority litigation is that the process of asserting rights both enhances personal autonomy and creates context for sharing common struggles. It links "the individual to a broader social group," providing strength from a collective identity.[299] Karst theorizes that collective identification through litigation empowers minorities in two ways. It allows the minority individual to turn "inward to the cultural group" to alleviate isolation and also to "use the group identity to participate

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[293] Trubek, *Sociology of Civil Procedure*, *supra* note 92, at 119.

[294] *See* Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301, 304 (1987) [hereinafter Delgado, *Ethereal Scholar*] ("The experience of rights assertion [can be] one of both solidarity and freedom, of empowerment of an internal and very personal sort; it [can be] a process of finding the self"); Williams, *supra* note 59, at 414.

[295] *See* C. Gilligan, In a Different Voice 149 (1982) (rights assertion by women reorients self-conception to include importance of personal needs and contributes to moral development).

[296] Schneider, *supra* note 288, at 613–18. Traditional constitutional doctrine over the last 30 years has recognized dignity concerns of minorities. One theory justifying heightened standards of judicial review is that minority groups have been unfairly stigmatized by dominant groups and are therefore especially susceptible to governmental mistreatment. *See* Lawrence, *Unconscious Racism*, *supra* note 23.

[297] *See* MacKinnon, *An Agenda for Theory*, 7 Signs, J. Women Culture & Soc'y 515, 519 (1982) (rights assertion as a method of consciousness-raising and as a theory of social change for women).

[298] Schneider, *supra* note 288, at 602, 603 ("The idea of consciousness-raising as a method of analysis suggests an approach to social change which recognizes dynamic tension, reflection, and sharing as essential aspects of growth.").

[299] *Id.* at 617–18.

in the institutions of [the] wider society."[300] For Dworkin, the moral aspirations of rights claimants also engender a community of principle.[301]

Whether derived from shared contexts or common aspirations, some minorities experience rights as "invigorating cloaks of safety that unite us in a common bond."[302] That common bond is an extension of the individual's dignity interest.[303] Traditionally, dignity is viewed with the individual as its referent. Victims of subordination find power in uniting to fight their oppressors. Each act of rights assertion brings a measure of personal dignity to the individual who feels aggrieved by powerful institutions.[304] Each accords the group a sense of power through the individual's resistance to institutional subjugation.

Many members of the Filipino community believed that Fragante was asserting not only his own grievance, but also those of other Filipinos excluded from employment due to their accents. Litigation was the only means available to compel the City of Honolulu to respond formally and to account for its practices. Group dignity and power accrued from a sense of having an avenue of potential recourse.[305]

3. Mobilization of Group Activity

Enhanced personal autonomy and intensified community bonds arising from rights assertion foster individual participation

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[300] Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. Rev. 303, 337–38 (1986). *See also* Scales-Trent, *supra* note 289, at 15, 41–43. Minow describes a cultural dualism:

> Although members of minority groups have historically felt an obligation to become conversant in the world view of the majority, they have also made an effort to preserve their own. Minority group members and their sympathizers alike celebrate these experiences in bilingualism and biculturalism as a strategy of resistance and as a method for exposing the workings of power.

Minow, *Justice Engendered*, *supra* note 59, at 69. *See also* Minow, *Interpreting Rights: An Essay For Robert Cover*, 96 Yale L.J. 1860, 1874 (1987) [hereinafter Minow, *Interpreting Rights*] ("those claiming rights implicitly invest themselves in a larger community, even in the act of seeking to change it").

[301] R. Dworkin, Law's Empire 212 (1986) [hereinafter Dworkin, Law's Empire].

[302] Delgado, *Ethereal Scholar*, *supra* note 294, at 306–07.

[303] Michelman, *supra* note 224, at 1172.

[304] *See, e.g.*, Chalk v. United States District Court for Central District of California, No. 87-6418 (C.D. Cal. Feb. 28, 1988) (issuing preliminary injunction restoring public school teacher with AIDS to classroom).

[305] *Honolulu Star-Bulletin*, July 18, 1989, p. 1, col. 4.

in group effort. Public law litigation often entails group representatives litigating in an effort to restructure social and government institutions. Group support is essential.

Political organizing skills emerge through rights assertion that are useful in other arenas.[306] Elizabeth Schneider has observed that equal rights and reproductive rights claims "advanced the political development and organizing potential of the [women's] movement, and expanded and concretized the consciousness of feminist activists and litigators."[307] Citing litigation involving the Pregnancy Discrimination Act[308] as an example, Schneider notes that it "clarified and heightened the debates within the movement itself and then turned insights back into theory."[309]

Values of individual dignity and participation are transformed into collective identification and community bonding that facilitate group organization and group participation. Perceptions of procedural fairness are enhanced, fostering citizen assent. Efficiency procedural reforms that privatize the dispute resolution process and otherwise discourage court access for marginal claimants undermine these empowerment values in the very situations in which they are most compelling.

B. Procedure and the Communication of Group Voice: A Forum for Negotiation of Public Values

Minority litigation experience suggests a transformed external participation value: making a subordinated group's voice heard by those more powerful.[310] Courts sometimes serve as

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[306] Schneider, *supra* note 288, at 629, 640, 647–48.

[307] *Id.* at 640.

[308] 42 U.S.C. § 2000e (1982).

[309] Schneider, *supra* note 288, at 640–41.

[310] Federal courts and to a lesser extent state courts have provided minorities an important avenue of political participation.

> For nearly two hundred years of this nation's history, few Blacks, Hispanics or Asian-Americans, to name only a few victims of oppression, would have thought of taking their claims to court; they knew they would receive no hearing there. But today, the expectations of the disadvantaged, as well as the sensitivity of our society to their plight, have been heightened. Discrimination and second-class treatment will no longer be patiently endured, quietly tolerated. The victims of racism, sexism, and poverty, the aged, the physically and

forums for raising public awareness of nonmainstream perspectives.

The Supreme Court has recognized the value of litigation discourse, noting that a lawsuit can be a "vehicle for effective political expression . . . , as well as a means of communicating useful information to the public."[311] That value extends beyond a formal soapbox for venting.[312] Rights assertion triggers the exertion of state power, bringing parties into a fixed forum and laying a foundation for potential minority participation in negotiations about public values.

Particularly for minorities asserting marginal claims challenging the legitimacy of social understandings reflected in substantive law, accessible courts are potential forums for recasting the terms and tenor of mainstream discourse and focusing attention on the professed objectivity of those with decisional power.[313] It enables the powerless to weaken the monopoly over language and mainstream thought maintained by the powerful.[314]

Recent scholarship exposes the link between political and economic power, on the one hand, and the production of certain

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mentally disabled are demanding that they be heard, and they are increasingly turning to the courts to demand redress of fundamental injustice.

Brennan, *Address*, 6 U. Haw. L. Rev. 1, 5 (1984) (quoting an address by David Bazelon, Sr., circuit judge, commencement, University of Washington School of Law (June 11, 1983)). Kathy Ferguson views the assertion of rights by women "as a means of active participation in public life." Ferguson, *supra* note 288.

[311] *In re* Primus, 436 U.S. 412, 431 (1978). *See also* Chicago Council of Lawyers v. Bauer, 552 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). ("In our present society many important social issues become entangled . . . in litigation. Certain civil suits may be instigated for the very purpose of gaining information for the public . . . . Civil litigation in general often exposes the need for governmental action or correction").

[312] Minority perspectives are communicated through the legal process to the public in at least three general ways. First, group members spread the message about the litigation and its issues to one another and to an expanding circle of interested others through word of mouth, newsletters, meetings and demonstrations. Second, if the litigation appears controversial and the message can be packaged attractively, the news media will present a minority's views. Finally, the court's decision and opinion become recorded history. The court's articulation and treatment of minorities' perspectives may have significant effect. It may recognize the legitimacy of those views or it may devalue them. In either event the court is likely to reveal value judgments that will serve as a basis for future discourse.

[313] Recent empirical research concludes that disputes and participants are often transformed by the process of rights assertion. Each stage of the process (naming a wrong, blaming someone, and claiming relief) is socially constructive and the dispute is recast at each stage. *See* Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 Law & Soc'y Rev. 631 (1980–81).

[314] Mashaw, *supra* note 61.

kinds of language, on the other.[315] What people in powerful positions say are real differences between people often justifies legal rules mandating differential treatment of those less powerful. These statements of difference also influence what the public perceives as real differences.

Courts provide a forum for public examination of statements and assumptions about difference, entertaining rights claims not as immutable objects but as "processes of communication and meaning-making."[316] Minow calls for "settings in which to engage in the clash of realities that breaks us out of settled and complacent meanings and creates opportunities for insight and growth."[317] Participation in the legal process can provide a formal public setting that facilitates a "clash of realities,"[318] sometimes leading to a "dialogue through which we

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[315] "Dominant cultural expressions of what is different and what is normal" are influenced by those with power to "construct legal rules and social arrangements." Minow, *Justice Engendered*, *supra* note 59, at 33. *See* Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739 (1982); White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684 (1985).

[316] Minow, *Interpreting Rights*, *supra* note 300, at 1862.

[317] Minow, *Justice Engendered*, *supra* note 59, at 95. "Law, particularly as administered in the courts, provides apparent mechanisms for orchestrating competing points of view. With law as the battleground, we must ask: will courts reinforce the illusion of one reality, or devise ways to take minority perspectives seriously?" *Id.* at 69.

[318] Minow describes five "powerful unstated assumptions" about "whose point of view matters, and about what is given and what is mutable in the world." *Justice Engendered*, *supra* note 59, at 13. These assumptions are called into question when minorities assert new rights or novel theories challenging existing social arrangements and prevailing legal principles. The first assumption is that "'differences' are intrinsic, rather than . . . expressions of comparisons between people." *Id.* at 32. This means that difference is an objective state that is to be discovered, and not an expression of a relationship between the person naming the difference and the person named. The second is that the assessment of others is often made from an "unstated point of reference" that is assumed to be "neutral." This unstated point of comparison, however, is "not neutral, but particular," and a "notion of equality that demands disregarding a 'difference' calls for assimilation" to that unstated norm. *Id.*

The third assumption is that people treat the "perspective of the person doing the seeing or judging as objective, rather than as subjective." This assumes that people with decisional power view matters objectively with even-handed consideration of all interests. The fourth assumption is that the "perspective of those being judged are either irrelevant or already taken into account through the perspective of the judge." *Id.* at 33. The fifth assumption is that "existing social and economic arrangements are natural and neutral." This presumes that people are "free to form their own preferences and act upon them" and that "any departure from the status quo risks non-neutrality and interference with free choice." *Id.*

Minow rejects these assumptions and offers "alternative starting points" that are rooted in Supreme Court opinions:

remake the normative endowment that shapes current understandings."[319]

What are the dynamics of this dialogue? Many situations probably are more monologic than dialogic. Those more powerful listen but do not hear. Some situations produce mainstream backlash.[320] Others enable minorities and open-minded decisionmakers to find common ground that reveals the incompleteness and impropriety of mainstream views about minorities.[321] Reluctant decisionmakers might be impelled to confront the internal conflict they experience, arising out of their belief in fairness and equality in principle and acceptance of unfairness and inequality in fact.[322] Conflict generated by rights claims and heightened by the media and community groups might push decisionmakers towards negotiation. At a minimum, rights claims "structure attention even for the claimant who is much less powerful than the authorities" and for groups "treated throughout the community as less than equal."[323]

Feminists have challenged the statements and assumptions of female inferiority underlying many judicial and administrative decisions by expanding shared context and by creating internal or external dissonance. In conjunction with developments in

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> Difference is relational, not intrinsic. Who or what should be taken as the point of reference for defining differences is debatable. There is no single, superior perspective for judging questions of difference. No perspective asserted to produce 'the truth' is objective, but rather will obscure the power of the person attributing a difference while excluding important competing perspectives. Social arrangements can be changed: maintaining the status quo is not neutral and cannot be justified by the claim that everyone has freely chosen it.

Id.

[319] *Id.* at 95.

[320] The English Only movement, manifested in state constitutional amendments and legislation, can be seen as an example of majority reaction to the emergence of minority views and the recognition of minority rights. *See generally* Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345 (1987).

[321] Minow, *Interpreting Rights*, *supra* note 300, at 1881 (rights discourse affirms a "community dedicated to invigorating words with power to restrain . . . a community that acknowledges and admits historic uses of power to exclude, deny, and silence—and commits itself to enabling suppressed points of view to be heard, to make covert conflict overt").

[322] *See* Delgado, *Ethereal Scholar*, *supra* note 294, at 317.

[323] Minow, *Interpreting Rights*, *supra* note 300, at 1879. Minow acknowledges the "risk that those points of view that have been silenced in the past will continue to go unheard, and will be least adaptable to the vocabulary of pre-existing claims." *Id.* at 1880.

literature, science and social science, repeated use of legal forums contributed to recasting the terms of political debate about women's capabilities and social roles. This use of legal forums has revealed dominant perceptions of female inferiority measured by implicit reference to unstated amorphous male norms. Legal challenges have highlighted demeaning actions by sexist legislators, administrators and private entities that have been supported by court decisions. These challenges have rejected the legitimacy of such actions and court decisions, not just because these actions and decisions were adverse but because they were based on critically false assumptions.

The boundaries to acceptable employer and employee relations, for example, have been redefined in part by litigation over sexual harassment.[324] Similarly, discourse about justifications for wives killing their husbands has evolved from the traditional self-defense doctrine that required immediate threat of violence to the oppressiveness and abusiveness of the relationship.[325]

For Fragante, the courts served as a forum for publicly examining deeply rooted but generally unacknowledged assumptions resulting in limited employment opportunities for people with foreign accents. He challenged government administrators' reliance upon their preference not to hear accented speech as the basis for finding him unqualified for a job he was otherwise well qualified to perform. By so doing, he questioned the use of mainstream preferences as the sole referent for determining the "right" of outsiders to benefit from societal opportunities.

The *Fragante* trial was the centerpiece of Fragante's efforts to communicate his views publicly. Media coverage of the trial transformed the constitution of those "adjudicating" the case. Those judging the city's practices and explanations were no longer only people in the courtroom and Fragante's immediate supporters. Rather, a segment of the wider public participated.

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[324] C. MacKinnon, Sexual Harassment of Working Women (1979) (establishing a framework for and urging recognition of a claim for sexual harassment). *See generally* Schneider, *supra* note 288, at 643.

[325] Schneider, *supra* note 288, at 606–09 (discussing the philosophy and litigation strategy of lawyers and activists in transforming the traditional self-defense argument).

The trial enabled Fragante to communicate with others who felt individually powerless to address discrimination based on unchallenged assumptions about group relations. As discussed, had efficiency procedural reforms been firmly in place in 1983, there probably would have been no *Fragante* litigation.

C. Procedure and Persistence: The Continual Renegotiation of Public Values

Minorities' attempts to challenge mainstream assumptions about difference have resulted and will continue to result in protracted political battles. In those situations, repeated assertions of rights through litigation can help focus issues by compelling formal public statements of justification by those with decisionmaking power. Repeated challenges may transform social concerns into recognized rights, thereby recharging political movements. Prominent examples include the *Korematsu*, *Hirabayashi*, and *Yasui coram nobis* cases, which rekindled the reparations movement for Japanese-American internees.[326]

Procedures hospitable to the assertion of marginal public law claims contribute to the process of continual renegotiation of public values. While a dissertation of sociological and political theories on the dynamics of law and social structural change is beyond the scope of this Article, a useful overview is offered by Mather. She asserts that judicial outcomes at any one time provide "tentative resolutions to conflicts, but [that] policy . . . continue[s] to be fashioned and refashioned through succeeding elections, administrative orders, [and] lawsuits."[327] This is consistent with a view of judicially declared principles as dynamic rather than static, as influenced by myriad shifting social, economic and political forces as well as by process constraints.

Many declared judicial principles disfavor the disadvantaged.[328] Some that appear to be favorable are later weakened

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[326] *See supra* notes 1–8 and accompanying text.

[327] Mather, *The Mobilizing Potential of Class Actions*, 57 Ind. L.J. 451, 454 (1982).

[328] Eskridge observes that recent Supreme Court public values analysis, in the context of statutory interpretation, reveals a bias for the powerful over the powerless. Traditionally subjugated groups come out losers. Eskridge, *Statutory Interpretation*, *supra* note 278, at 1088–89. While this provides a jolt to any romanticized view of the

by judicial interpretation. Some principles are cast so broadly that they provide little meaningful guidance for day-to-day public behavior. Some legal arguments reinterpreting notions of appropriate social relations never prevail. Some rights claims, however, are rejected by courts as untenable, if not outlandish, until "developing lines of legal or social thought" make them acceptable.[329] Central to the renegotiation process is the opportunity of those affected to participate meaningfully.[330]

One key to meaningful participation is an accessible judiciary. Its heart is a procedural system that values "the process by which hurts that once were whispered or unheard . . . become claims, and claims that once were unsuccessful, . . . persuade . . . others and transform . . . social life."[331] Repeated assertions in court of rights that "dislodge and disturb existing patterns of power"[332] are means for those without effective access to elective or bureacratic power of participating in and sometimes reshaping the larger social dialogue over time.

Social movements for gender[333] and racial equality, in particular, have benefitted from a procedural system tolerant of

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value of minority rights assertion, it does not undercut the thesis that rights litigation can be valuable for minorities even when their rights claims fail, even when the immediate outcome of public values analysis hurts.

[329] Yamamoto, *Case Management, supra* note 43, at 437. As a court of appeals judge, former Chief Justice Burger characterized an argument about circumstances justifying an indigent's right to counsel during a lineup as a "Disneyland contention . . . bizarre . . . absurd . . . nonsensical." Williams v. United States, 345 F.2d 733, 736–37 (D.C. Cir. 1965). In a later case, the Supreme Court adopted essentially that Disneyland position in recognizing an expanded right to counsel for indigents. United States v. Wade, 388 U.S. 218 (1967). Risinger describes the process: "Today's frivolity may be tomorrow's law, and the law often grows by an organic process in which a concept is conceived, then derided as absurd (and clearly not the law), then accepted as theoretically tenable (though still not the law), then accepted as the law." Risinger, *Striking Problems, supra* note 100, at 57.

[330] *See generally* Habermas, Legitimation Crisis, *supra* note 239.

[331] Minow, *Interpreting Rights, supra* note 300, at 1867.

[332] Minow, *Listening, supra* note 251, at 952.

[333] Initially, the equal protection clause of the fourteenth amendment provided no protection for women against sex-based discrimination. States continued to pass and courts continued to uphold sex-based classifications that reflected traditional sexual stereotypes.

The first notable challenge to sex-based classifications was Bradwell v. Ilinois, 83 U.S. (16 Wall.) 130 (1872). Relying upon a then expansive construction of the privileges and immunities clause, Bradwell challenged the Illinois legislature's refusal to allow licensure of qualified female lawyers. Justice Bradley, writing for the Court, rejected Bradwell's position, observing:

repeated rights claims.[334] Recent efficiency reforms discourage such repeated assertions of rights and reopening of cases tried and failed. Had efficiency reforms been in place, there probably

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> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things.

Id. at 141–42.

This assumption about the incompetence and role of women in society permeated the Court's decisions for almost a century. It justified differential, and usually demeaning, treatment of women. Repeated challenges to this assumption as the basis for governmental action failed. They nevertheless helped keep key issues alive. As women obtained the right to vote and entered colleges and workplaces in substantial numbers, these challenges and a slowly evolving social view of women and ethnic minorities produced erratic statements of principle by the Court. In the early 1960's, the Court rejected the presumption that a wife acts under the influence of her husband, stating that this "implies a view of American womanhood offensive to the ethos of our society" and disregards the "vast changes in the status of woman—the extension of her rights and correlative duties." United States v. Dege, 364 U.S. 51, 53–54 (1960). No important doctrinal statement emerged, however, and the very next year the Court contradicted itself and upheld a state's differential treatment of prospective male and female jurors. Rejecting the argument that independent judicial scrutiny was appropriate, the Court deferred to state legislative judgment that women belonged at home rather than in a jury box, noting that "despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of the home and family life." Hoyt v. Florida, 368 U.S. 57, 61–62 (1961).

Women's consciousness and recognition of historical sex discrimination heightened in the 1960's. Demands for equality were strongly asserted: equal pay for equal work, equal access to schools and professions, and prevention of sexual harassment on the job. Two important Supreme Court decisions reflected that growing concern and established principles encouraging future challenges to discriminatory government action. Reed v. Reed, 404 U.S. 71 (1971), for the first time offered some remedy for sex discrimination. The Court accepted in spirit if not in literal terms Reed's argument that the minimum rationality test for discriminatory legislation should be abandoned in favor of heightened judicial scrutiny. Two years later a plurality of the Court in Frontiero v. Richardson, 411 U.S. 677 (1971), acknowledged that gender, like classifications based upon race, alienage and national origin, is "inherently suspect and must therefore be subjected to strict judicial scrutiny." *Id.* at 682. Justice Brennan, citing *Bradwell*, noted that "there can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism,' which, in practical effect, put women, not on a pedestal, but in a cage." *Id.* at 684.

Repeated assertions of women's rights to equal treatment failed in the courts until broadly developing lines of social and political thought heightened acknowledgment of historical discrimination against women and the role of law in perpetuating the pernicious effects of that discrimination. Although the social effect of the Court's recent articulation of principle is difficult to assess, it seems safe to conclude that repeated litigation about the effects of sex discrimination contributed to the women's movement's progress toward equality and sharing of power.

[334] This sweeping observation is explained in *infra* notes 358–388 and accompanying text by a general description of protracted racial integration litigation.

would have been no timely reopening of *Korematsu*. There would have been no public examination of and formal government response to Korematsu's charge of the government's fabricated basis for the internment, no court ruling supporting the reparations effort, and less debate about the continuing danger of judicial deference to the government's claims of national security as the basis for restricting fundamental liberties of citizens.[335]

Would the litigation of *Brown v. Board of Education*[336] have been inhibited or limited by efficiency reforms? The Supreme Court in *Brown* rejected the separate-but-equal doctrine as it applied to public schools and held that racial segregation in the schools violated the equal protection clause. Brown's attorneys from the NAACP directly challenged the social understandings underlying the separate-but-equal doctrine, arguing that segregated schools were "inherently unequal." Segregation itself produced harmful effects.[337]

The attorneys cast their argument in the context of a novel characterization of minority rights. The right was to race-neutral assignment and that right belonged to every student. The argument changed the reference point from white students and the harm they might suffer as a result of integration to all students and the harm they would suffer from continued segregation.[338]

The NAACP had not committed itself to this legal theory until *Brown* was argued before the Supreme Court.[339] Out of the civil rights agitation of the late 1940's and early 1950's emerged a view that separate could never be truly equal and that equality

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[335] Yamamoto, *Korematsu Revisited, supra* note 4.

[336] 347 U.S. 483 (1954).

[337] Arguing from the vantage point of both black and white students, the attorneys offered the research of sociologists, anthropologists, psychiatrists and psychologists as support. *Id.* at 494 n.11.

[338] *See* R. Kluger, Simple Justice 543–81 (1975) (describing the development of the legal theory in *Brown*).

[339] Carter, *The NAACP's Legal Strategy Against Segregation*, 86 Mich. L. Rev. 1083, 1089 (1988). Thurgood Marshall and the other NAACP attorneys approached early desegregation cases by arguing in the alternative. They argued, first, that the black schools involved were in fact unequal to white schools, and, second, that in any event, segregated schools were per se unequal. Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. of Negro Educ. 316 (1952); *see also Rule 11 in the Constitutional Case*, 63 Notre Dame L. Rev. 788, 811 (1988).

in fact was a moral imperative. *Brown* followed a series of rights challenges to racial discrimination in public schools, many unsuccessful,[340] which wrestled with the translation of moral and political concerns into legal theory. Just six years before *Brown*, the Supreme Court rejected outright the basic argument that it embraced in *Brown*.[341] Federal court procedure facilitated that translation by accepting a series of rights claims located beyond the boundaries of prevailing law.

Brown's authoritative statement of public values was immediately extended beyond the realm of public education. The civil rights movement, encouraged by *Brown*, also attacked overt discrimination in housing, jobs and public facilities[342] and contributed to a reorientation of mainstream public consciousness.[343]

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[340] For various failed challenges to segregation, see Gong Lum v. Rice, 275 U.S. 78 (1927) (denial of Chinese American student's admission into school for whites); Berea College v. Kentucky, 211 U.S. 45 (1908) (Kentucky statute mandating statewide school segregation); Cummings v. Board of Educ., 175 U.S. 528 (1899) (closure of black high school); Fisher v. Hurst, 333 U.S. 147 (1948); Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950). *Cf.* Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 639 (1950) (invalidating segregation in two public schools as unequal under the circumstances, but without directly undermining the separate-but-equal doctrine).

[341] *See* Fisher, 333 U.S. 147.

[342] *See* Schiro v. Bynum, 375 U.S. 395 (1964) (municipal auditoriums); Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom seating areas); Turner v. City of Memphis, 369 U.S. 350 (1962) (airport restaurants); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (athletic events); New Orleans Park Improvement Assoc. v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Muir v. Louisville Park Theatrical Assoc., 347 U.S. 971 (1954) (parks).

[343] Charles Lawrence has described the "cultural meaning" of segregation that *Brown* communicated. Lawrence, *Unconscious Racism*, *supra* note 23 (describing the cultural message conveyed by segregation that African-American children were inferior and unfit as schoolmates for white children). A sanguine view of *Brown* and its impact has been challenged. Derrick Bell, through his powerful fable, specifies the charges. *See* D. Bell, And We Are Not Saved (1988) [hereinafter Bell, Not Saved]. One charge is that *Brown* represented less a landmark victory for racial minorities than an illusory gain for African-Americans and an accommodation of society's dominant economic and political interests. Lewis Steele, an NAACP attorney, wrote in 1958 that *Brown*'s mandate of "all deliberate speed" for the integration of schools was nothing more than a license for continued discrimination. *See id.* at 61 (quoting Steele). Others argued that *Brown* would not "have been possible without the world pressure of communism" because it was "simply impossible for the United States to continue to lead a 'Freed World' with race segregation kept legal over a third of its territory." *Id.* at 62.

Another charge is that *Brown* is less than meets the eye, that for all its sound and fury little of value has changed. *See* Freeman, *Antidiscrimination Law: A Critical Review* in The Politics of Law: A Progressive Critique 96 (D. Kairys ed. 1982). One contention,

The debate about racial justice continues among groups with divergent interests. There are more participants now than during the pre-*Brown* era. One reason is a procedural system tolerant of persistent challenges to legal principles and social understandings. Open court access has contributed to a reshaping of the parameters of the debate so that it now encompasses minority voices previously silent.

D. Procedure and the Separation of Powers Ideal

The importance of these voices to the renegotiation of public values is underscored by the separation of powers ideal. The lack of minority group opportunity to participate in legislative or executive processes and the impracticability of forming influential coalitions with other minorities, places those asserting marginal rights claims outside of these political decisionmaking processes and subjects them to the will of majorities. The lack of opportunity for stigmatized minorities to participate meaningfully in governmental processes justifies heightened judicial scrutiny under the separation of powers ideal. Even in situations where the legislative process has responded generally to problems of discrimination and provided a scheme for protection of minority interests, e.g., the Equal Pay Act of 1963, the Civil Rights Act of 1964, and the Voting Rights Act of 1965, a minority individual's rights under that scheme are enforced through litigation. The legislative process yields benefits only to the extent that minorities are assured direct participation through the courts to compel compliance by recalcitrant bureaucrats and private persons.

Diminished minority access to the courts resulting from efficiency reform thus exacerbates the problem heightened ju-

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addressed specifically to educational enhancement for African-Americans, is that integration has not improved the quality of education. *See* Lawrence, *supra*. The last 10 years have been characterized as a time of stagnation and retrenchment. Social and political conditions may be better than they were in 1954 for some but not all minorities, and racism persists. *See* Jaynes & Williams, A Common Destiny: Blacks and American Society (1989).

Criticism that *Brown* as a precedent resulted in far less than initially predicted is accurate. Criticism that the cloak of omnipotence draped over *Brown* by some is an illusion is also apt. Recognizing *Brown*'s limitations as legal precedent, however, need not obscure its significance in the process of public values articulation.

dicial scrutiny is supposed to address. Diminished access reduces minority participation in a judicial process designed to rectify the lack of effective minority participation in overtly political processes.[344]

As discussed, traditional values analysis provides only a limited response to utility theory's question: why be concerned about minority perceptions of unfairness generated by efficiency reforms as long as the majority experiences enhanced perceptions of fairness? The separation of powers ideal provides a powerful response. Diminished minority participation in the process of negotiating public values strikes at the heart of the structure of American society and its system of governance. One role of the judiciary is to provide a formal forum in which to address disputes about group interests and public values arising out of severe imbalances in power among social groups. Diminished minority access to judicial forums for negotiating public values threatens that separation of powers ideal.

E. Procedure and the Quest for Decency

In addition to their importance to the process of negotiating public values, public law adjudication in general and minority rights assertion in particular are valuable to society because they tend to be aspirational. They focus attention on the human condition. They highlight values of equality, liberty, due process and privacy that transcend property and economic interests and individual concerns.[345] These values "stand as the core of a public morality."[346]

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[344] What constitutes a lack of meaningful minority participation in overtly political processes? Some minority groups have greater political influence on mainstream decisionmakers than others. And what constitutes meaningful rather than token participation? A plurality of the Supreme Court recently addressed this question in *Cleburne*, 473 U.S. at 443–44.

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> It was the determination of black men and women to be truly free that transformed the Constitution from a document speaking rights as the main means of protecting property and privilege into an instrument in which the concept of rights has gained a humane purpose and significance for even those who lack property, and for whites as well as blacks.

Bell, Not Saved, *supra* note 343, at 252.

[346] Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & Hum. Behav. 121 (1982) [hereinafter Fiss, *Foundations of Adjudication*].

In seeking to reconceptualize appropriate institutional behavior, litigants asserting rights endeavor to "create a new status quo, one that will be more nearly in accord with our constitutional ideals."[347] Opinions diverge wildly about what our ideals are and ought to be. Challenges through litigation continue to focus debate on those questions.

Minorities have demanded reinterpretation of ideals through litigation in the context of schools, public facilities, institutions for the mentally ill and retarded, housing, prisons and public assistance programs. Rights assertion by minorities can thus be viewed as an integral and concrete part of a process of transforming dominant visions of community and society.[348] As such, rights assertion also is a discomforting symbol of our continuing quest for human decency.[349] Laurence Tribe has identified an antisubjugation principle that aims "to break down the legally created or legally reenforced systems of subordination that treat some people as second-class citizens."[350] The "core value of this principle is that all people are of equal worth."[351] The goal of equal protection "is (or should be) not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all."[352] An implicit message is that society's moral fabric is strengthened by concern about decent treatment of its least advantaged and that society is strengthened to the extent people recognize a common humanity and move towards acceptance of the equal worth of all people and towards the rejection of group relations characterized by dominance and subservience.

Some argue that the law has failed to convey that message effectively. Discrimination persists. Open hostility towards minorities appears to be on the rise. Courts seem less inclined to discourage oppressive acts by powerful majorities directed at

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[347] Id. at 124.

[348] *See* Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 Harv. L. Rev. 985 (1990) (describing a need for concrete mechanisms to transform theories of reconstituted community into social action).

[349] Other views might be that many minorities are simply attempting to gain a share of society's resources, or that rights assertion is a means of getting even with those more powerful.

[350] L. Tribe, American Constitutional Law 1515 (2d ed. 1988).

[351] *Id.*

[352] *Id.* at 1516.

minorities.[353] There is substance to these observations. Others acknowledge the limitations of rights litigation but maintain a more salutary view of rights assertion in the context of protracted political efforts. Bell puts it eloquently: "[L]itigation as well as protests and political efforts [should] pursue reform directly as well as create continuing tension between what you are and what you might become."[354] Out of this tension "may come the insight and imagination necessary to recast the nation's guiding principles closer to the ideal—for all Americans."[355]

F. Summary

This section evaluated the cumulative effects of efficiency reforms according to nontraditional procedural values. Traditional procedural values analysis provided the foundation. Developments in procedural theory, however, recasted and expanded traditional values analysis to acknowledge group relations characterized by domination and subordinance, to challenge the myth of the inherent neutrality and fairness of procedure, to recognize the empowerment potential of rights litigation, and to acknowledge the function of procedure in the articulation of public values. The reformulated values framework just described identified values relating to court access especially for minorities asserting marginal rights claims. This Article has suggested that these values are integral to a humane, functioning legal system in a society committed to democratic principles.

Recent reforms in civil procedure threaten to undermine these essential values in two significant respects. First, and most important, the reforms foster efficiency in part by discouraging court access for plaintiffs asserting rights claims at the margins of prevailing law. Second, the reforms accept and encourage the privatization of dispute resolution as a means of cutting litigation costs. Minorities challenging mainstream social understandings ostensibly justifying harsh legal arrangements pay an inordi-

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[353] *See supra* notes 11–15.
[354] Bell, Not Saved, *supra* note 343, at 255.
[355] *Id.*

nately high price for the system's efficiency benefits. Their access to formal public forums to compel serious responses by those in power on issues of public import is curtailed.

In these respects, efficiency procedural reforms collide with the separation of powers ideal and undermine values of empowerment and participation in the development of public values. They also trivialize the value of court access in cases such as *Korematsu* and *Fragante*. They evince a yearning for less complicated, less burdensome litigation aimed at restoring rather than unsettling the status quo—a yearning that is in many ways "blind to social context."[356] Judgments critical to the design and operation of recent reforms dismiss as uncompelling the continuing interplay of the political, social, and economic forces that enliven the values of accessible courts for minorities.[357]

V. Rights, Politics and Procedure: Concluding Thoughts

Why should minorities and society care about changes in civil procedure? If courts are narrowing substantive rights, should not minorities abandon the judiciary as a vehicle of

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[356] *Id.* at 170. Efficiency reform tends to assume a wishful view of social and political institutions: a "complacent, simplistic assumption that American society consist[s] of happy, private actors maximizing their valid human wants while sharing their profound belief in institutional competencies." Mensch, *supra* note 218, at 30. Mensch's statement addressed faulty assumptions of legal process theory and is equally applicable to the assumptions of recent procedural reform.

[357] Although executive efforts to shrink regulatory bureaucracies have partially succeeded, public endorsement of government regulation in areas of health, safety and environment remains strong. Where regulation is ineffective, as in the Alaskan oil spill and clean-up debacle, litigation may be an essential option for harmed individuals and groups. And corruption within agencies such as the Department of Housing and Urban Development, whose mandate is to assist the disadvantaged, underscores the need to keep government accountable.

Fair distribution of entitlements remains a function of government. Cutbacks in program funding and eligibility criteria continue to generate disputes of individual and group significance. People with tenuous claims under revised criteria may ultimately receive nothing. Nevertheless, they should not be deterred from challenging what they believe to be bureaucratic mistakes with serious personal consequences.

The civil rights landscape shows marks of increasing turmoil. Executive conservatism, Supreme Court retrenchment, conservative political activism and extremist violence collectively are sending minorities an unmistakable message: enough has been too much. As institutions reinterpret and narrow the scope of minority rights, the need for forums to organize and communicate intensifies.

progress?[358] Indeed, Cover suggested that public values might be most productively developed outside the judicial arena.[359]

This Article's specific response to the question of why minorities should be concerned lies in the values of minority rights assertion developed in the preceding section. That response is located generally within an emerging jurisprudence of rights, politics, and community. The debate about rights continues.

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[358] The federal courts have grown markedly more conservative in their procedural as well as substantive rulings on public law issues. Note, *All the President's Men?: A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 Colum. L. Rev. 766 (1987). Ronald Reagan appointed one third of the Supreme Court justices and over one half of the federal district and circuit court judges. Reagan's judicial appointments campaign promoted candidates likely to rule conservatively. Schwartz has characterized former President Reagan's judicial appointments as a "campaign to turn the clock back" on civil rights and transform "American life and law." Schwartz, Packing the Courts—The Conservative Campaign to Rewrite the Constitution (1988) (Schwartz' analysis has been criticized as suffering from an "excess of zeal" and as the work of an "advocate". Lauter, *Packing the Courts—The Conservative Campaign to Rewrite the Constitution* (Book Review), 74 A.B.A. J. 124, 124–25 (1988)). Indeed, recent qualitative and quantitative studies indicate that Reagan appointees are more conservative on civil liberties issues than their Republican colleagues appointed by Presidents Nixon and Ford. Note, *All the President's Men*, *supra*, at 776–77. These studies also demonstrate unequivocally that Republican-appointed judges are overwhelmingly more conservative in their substantive rulings on public interest issues than Democrat-appointed judges. They also use procedural devices to defeat public interest positions with twice the frequency. *Id.* at 778.

"Hostility" to civil rights statutes and decisions expressed quietly through "technical and procedural outlets" reflects a masking approach that, according to some, emanates from the top. Sanders, *Chipping Away At Civil Rights*, Time, June 26, 1989, at 66 (quoting Professor Eleanor Holmes Norton). The approach has been attributed to the Burger Court and, with increasing intensity, to the Rehnquist Court. Chayes, *Role of the Judge*, *supra* note 44, at 1305 ("One suspects that at bottom [the Burger Court's] procedural stance betokens a lack of sympathy with substantive results and with the idea of the district courts as vehicles of social and economic reform"). *See also* Tribe, Constitutional Choices, *supra* note 48 (describing proposed legislation limiting federal court jurisdiction over certain types of public law disputes).

Consistent with the administration's efforts to recast the judiciary, Professor Caplan's study reveals an effort by the Reagan Administration to reform the Solicitor General's role from solicitor on behalf of the country to zealous advocate of the president's social agenda. L. Caplan, The Tenth Justice—The Solicitor General and the Rule of Law (1987) (quoting Rex Lee, former Solicitor General during the Reagan Administration: "There has been this notion that my job is to press the Administration's policies at every turn and announce true conservative principles through the pages of my briefs. It is not. I'm the Solicitor General, not the Pamphleteer General."). *See also* Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 48 U. Miami L. Rev. 1171 (1986).

[359] Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 1, 4 (1983) (describing the development and effectuation of normative commitments by small communities removed from or in opposition to sources of state authority ("jurigenesis") and the fragmenting or destructive nature of judicial process ("juripathic")).

Conservative theorists perceive undue judicial expansion of rights. Rights have been created without authoritative bases, and rights litigation has promoted social conflict and disharmony.[360] Liberal theorists have endeavored to locate legitimate bases of rights, implicitly accepting the legal system's capacity to produce just outcomes and engender social progress.[361] Critical theorists have criticized liberal rights theory as divorced from political and social context.[362] At the extreme, rights are viewed as formalistic, individualistic, and indeterminate.[363] Rights and the judicial system serve to perpetuate society's unequal power relationships, and their deceptive promise of equality and liberty enervates political movements.[364]

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[360] *See generally* The Federalist Soc'y, The Great Debate: Interpreting Our Written Constitution (1986).

[361] To generalize broadly, overlooking many differences in perspectives, liberal rights theorists accept realism's rejection of formalism and its acknowledgment of difficult judicial value choices in the formulation and application of legal principles. They nevertheless believe that it is both desirable and possible to generate normative principles of justice that are general enough to engender consensus and specific enough to constrain discretion. *See, e.g.*, Dworkin, Law's Empire, *supra* note 301 (judges should endeavor to identify legal principles that are consistent with case precedent and community values and that comport with normative concepts of political morality); R. Dworkin, Taking Rights Seriously (1979).

[362] There is no one critical theory approach, and any attempt at generalization risks oversimplification. In broad outline, critical theory has attempted to shift the focus of legal argument. It is skeptical of the law's claim to "correct answers," and "true interpretations" reflecting "society's morals." It rejects liberal theorists' normative arguments that focus on abstract consensus values and neutral decisional procedures. It views this approach as disassociated from political reality and essentially a return to formalism that masks hard judicial value choices about competing societal interests. Thus critical theory rejects "traditional sources of norms such as the market system, the pluralist tradition, and classical liberalism." Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987) [hereinafter Matsuda, *Looking to the Bottom*]. Law is viewed as a belief structure or "system of meaning" constructed by people to deal with problems of social existence. For an insightful comparison of liberal and critical theories see Singer, *supra* note 75, at 467.

[363] Those with power to construct the system can, if unchecked, wield the law "neutrally," Gordon, *New Developments In Legal Theory*, in The Politics of Law: A Progressive Critique 286 (D. Kairys ed. 1982), to perpetuate unequal and unfair social and economic relationships. *See generally* Kennedy, *Form & Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Peller, *The Politics of Reconstruction*, 98 Harv. L. Rev. 863 (1985); Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983).

"Rights legitimize society's unfair power arrangements, acting like pressure valves to allow only so much injustice. With much fanfare, the powerful periodically distribute rights as proof that the system is fair and just, and then quietly deny rights through narrow construction, nonenforcement, or delay." Delgado, *Ethereal Scholar*, *supra* note 294, at 304 (summarizing and criticizing Critical Legal Studies). *See generally* Bell, Not Saved, *supra* note 343, at 174.

[364] Strident criticism of critical theory and CLS in particular has been voiced from

An emerging perspective rejects conservative theory's narrow focus on authoritative texts, acknowledges the limitations of liberal rights theory,[365] and recognizes the potential impediment in some instances of rights litigation and discourse to social progress. This perspective also recognizes, however, distinct values for minorities engaged in continued litigation and discourse about rights.[366]

Matsuda has noted minorities' dichotomous views of law arising out of minority litigation experiences. Minorities have experienced the influence exercised by powerful economic and political interests upon judicial decisions. In a social milieu tolerant of biased attitudes and discriminatory acts, judicial outcomes tend to denigrate minority interests.[367] Minorities also have "passionately invoked legal doctrine, legal ideals, and lib-

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without and within. Common criticism of CLS is that it reduces law to the personal predilections of judges. It is non-normative, "non-programmatic, over-idealized, inaccessible, cynical, anti-rational, and nihilistic." *See* Matsuda, *Looking to the Bottom*, *supra* note 363, at 349 (reciting common criticism).

Fiss sees CLS, along with law and economics, as two movements that "endanger the proudest and noblest ambitions of the law" and that "distort the purposes of law and threaten its very existence." Fiss, *The Death of The Law?*, 72 Cornell L. Rev. 1 (1988). He views CLS as endeavoring to "unmask the law, but not to make law into an effective instrument of good public policy or equity." *Id.* at 10. He contrasts the approach with that of feminist and realist theorists who "are moved by an affirmative vision . . . if not liberty, then a true and substantive equality" and who "appreciate how the law can be used to further that vision." *Id.* at 9.

[365] The most poignant criticism is that Rawls' theory assumes a single view of human nature, of individuals committed primarily to the attainment of individual ends. Matsuda, *Liberal Jurisprudence*, *supra* note 288, at 624–25. The influences of culture and social environment are purposely but unrealistically ignored behind the "veil of ignorance." Minow, *Justice Engendered*, *supra* note 59, at 60 n.240. Highly abstract principles derived from a single "universal" vantage point are not in fact universal and are misleading in assuming nonexistence of other legitimate views.

Another criticism is that Rawls' principles embody the conundrum of rights analysis. Minorities have a right not to be treated differently to their disadvantage by majorities because everyone deserves equal treatment. At the same time minorities have a right to favorable treatment in certain respects because historical mistreatment by the majority has placed them in a position of continuing disadvantage. *Id.* at 60.

[366] Minow, *Justice Engendered*, *supra* note 59, at 19 n.37. *See* Schneider, *supra* note 288, at 590 (the dialectical perspective posits a "dynamic inter-relationship of rights and politics, as well as the dual and contradictory potential of rights discourse to blunt and advance political development").

[367] Atticus Finch's moving defense of a black man falsely accused of sexually assaulting a southern white woman in To Kill A Mockingbird, in which he demands unsuccessfully that the jury rise above its prejudice, is a dramatic illustration. H. Lee, To Kill a Mockingbird (1960). For a discussion of moral implications, see Shaffer, *Christian Lawyer Stories and American Legal Ethics*, 33 Mercer L. Rev. 877, 879 (1982).

eral theory in the struggle against" discrimination and have succeeded partially due to the "passionate response that conventional legalism can at times elicit."[368]

Can the embrace and the distrust coexist? Matsuda suggests that they can and do, that "minority experience of dual consciousness accommodates both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy."[369] Responding to the "charge from the right that rights promote conflict rather than community"[370] and to the charge from the "left that rights reinforce individualism at the expense of community," scholars are forging a view of rights assertion that encompasses "debate over legal and political choices without pretending a social harmony that does not exist and without foreclosing social changes as yet unimagined."[371]

This view in important respects draws upon and extends a communicative theory of law. Jurgen Habermas describes modern societies as plural, marked by unequal distributions of power, wealth and status, whose laws and legal institutions are undergoing a "legitimation crisis."[372] A communicative theory of law links legitimacy to actual discourse in decisionmaking according to democratic principles, deriving the political legitimacy of substantive legal norms in significant part from the democratic attributes of the process generating them.[373] Strict

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[368] Matsuda, *Looking to the Bottom*, *supra* note 362.

[369] *Id.* at 341.

[370] For example, some CLS scholarship, with its deconstruction or "trashing" of rights, *see* Kelman, *Trashing*, 36 Stan. L. Rev. 293 (1984), is criticized as insensitive to minority experiences and the significance of rights assertions for minorities. Williams frames the general approach in her rejection of one CLS position on the detrimental effect of rights assertion by minorities:

> The goal is to find a political mechanism that can confront the denial of need. The argument that rights are dilute, even harmful, trivializes this aspect of black experience specifically as well as that of any person or group whose genuine vulnerability has been protected by that measure of actual entitlement which rights provide.

Williams, *Alchemical Notes*, *supra* note 59, at 413. *See also* Matsuda, *Looking to the Bottom*, *supra* note 362; Schneider, *supra* note 288.

[371] Minow, *Interpreting Rights*, *supra* note 300, at 1862. *See, e.g.*, P. Chevigny, More Speech: Dialogue Rights and Modern Liberty (1988); Schneider, *supra* note 288.

[372] Habermas, Legitimation Crisis, *supra* note 239.

[373] *See* J. Habermas, Theory of Communicative Action (T. McCarthy trans. 1987); Habermas, Legitimation Crisis, *supra* note 239; T. McCarthy, The Critical Theory of Jurgen Habermas (1978). Jean Cohen describes the core tenets of the discourse ethic in

procedures govern the process. Equality of access to and participation in the forums for decisionmaking are key. All those affected by the norms must have "an effective chance to assume dialogue roles."[374] This means that the dialogue "must be a fully public communicative process unconstrained by political or economic force," anyone potentially affected "may participate in the discussion on equal terms" and each participant can "shift the level of the discourse."[375]

A problem with this vision is that contemporary political and cultural institutions tend to undermine effective participation in the political dialogue about rights.[376] Access to elective and bureaucratic decisionmaking forums is blocked for some and others with initial access lack clout to shape or alter the terms of debate. Although courts are by no means immune from political and economic forces, they do provide potential leverage to those without power, enabling them to join and participate in shaping public values. Especially for minorities, courts can assist in the creation of procedural conditions for legitimacy in a way that ordinary political processes do not. In so doing, they can contribute to and stimulate the process of "cultural transformation" by encouraging those without established forms of power or social status to "assemble, associate and articulate positions publicly on the terrain of civil society."[377]

This view of rights assertion and courts tempers theory with experience and responds to the call for ways in which law can contribute to the transformation of reconstituted visions of community into better social conditions.[378] It is a view of rights

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terms of process and content. Cohen, *supra* note 40, at 1394 ("The first specifies the conditions of the possibility of the discourse leading to a legitimate rational agreement; the second articulates the possible contents [on a formal level] of such an agreement").

[374] McCarthy, *supra* note 373, at 316.

[375] Cohen, *supra* note 40, at 1395 (digesting the "demanding preconditions" set forth by Habermas).

[376] Cohen observes that "while the principles of formal democracy . . . are 'freedom guaranteeing,'" the institutionalization of these freedoms has been "selective at best and is, today, increasingly bureaucratic." Cohen, *supra* note 40, at 1405. "The possibility of participating in public opinion formation and genuine political discourse, and, hence, of influencing political decisionmaking, is considerably restricted through the segmentation of . . . the voter's role, competition of elites, vertical opinion formation in party apparatuses, manipulative techniques of the mass media, and culture industry." *Id.* at 1405.

[377] *Id.* at 1406.

[378] *See* Cook, *supra* note 348.

assertion that was viscerally accepted and strategically adopted by the *Korematsu* legal team in filing the *coram nobis* petition in 1983.[379] The legal team's analysis of the original *Korematsu* litigation led it to believe that the Supreme Court's ruling in 1944 was largely political rather than principled.[380] The team asserted this in its petition, drawing support from newly discovered World War II government documents that showed key government decisionmakers' overt reliance on racist stereotypes and their deliberate effort to mislead the Supreme Court about military necessity.[381] At the same time, the legal team decided to rely upon the indeterminate and discretionary principle of fairness embodied in the concept of due process in asking the same court that had convicted Korematsu forty years earlier to vacate his conviction.[382]

Korematsu's attorneys acknowledged the false cultural assumptions and political values at play in the Supreme Court's 1944 decision, recognized the shifting of attitudes towards the internment and focused on the expanded role of federal courts in addressing civil liberties. Despite predictions of failure from many corners, the legal team decided to employ traditional language of rights as the mechanism for confronting apparent anti-civil rights policies of the Reagan Administration, for expanding the support base for a legislative reparations movement, for publicly challenging lingering racial stereotypes and for rebuilding the self-image of an ethnic group still suffering from a grievous governmental wrong.[383] The legal team adopted political and social goals beyond the specific outcome of the litigation—goals directed both inward at the social group and outward toward the public. The team employed rights assertion as the vehicle.[384]

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[379] Korematsu, 584 F. Supp. 1406.

[380] *See* Korematsu, 323 U.S. 214. For an analysis of the Supreme Court's decision in 1944 and the *coram nobis* litigation in 1983, see Yamamoto, *Korematsu Revisited, supra* note 4.

[381] That belief was later confirmed by the formal findings of the Congressional Commission On Wartime Relocation and Internment of Civilians ("CWRIC") in 1983. The commission found that the internment was the result of war hysteria, racism and a failure of political leadership, and not on the basis of any military necessity. Report of the CWRIC, Personal Justice Denied (1983).

[382] *See* Yamamoto, *Korematsu Revisited, supra* note 4, at 2.

[383] For further discussion, see Matsuda, *Looking to the Bottom, supra* note 362, at 338.

[384] Interview with Minami, *supra* note 1. *See also* Schneider, *supra* note 288, at 605

Korematsu is an extraordinary case in many respects. It is not, however, an isolated example of dualism in minority legal consciousness or of the communicative value of judicial rights assertion for groups otherwise lacking meaningful access to political power.

A sanguine view of rights assertion, drawn from selected cases, might be criticized, as public values analysis has been criticized, as "contemporary legal utopianism."[385] *Korematsu* is an extraordinary case in part because of its unusual outcome. If in most cases rights are not being recognized, the process of rights assertion has a "self-deluding quality."[386] These are weighty, and troubling, criticisms.

If the view of rights assertion and procedure offered here were premised on the pluralist model of government decisionmaking or if the procedural values associated with minority rights assertions were linked to visions of voluntary power sharing and a single harmonious interpretive community, then the criticism would be damning. The view offered, however, rests on a different foundation. It acknowledges that group relations are often characterized by an imbalance of power and that dominant groups are unlikely to yield power willingly. It acknowledges that procedure sometimes produces bad substantive results.[387] It also acknowledges the potential of rights litigation to

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("We [at the Center for Constitutional Rights] asserted rights not simply to advance legal argument or to win a case, but to express the politics, vision, and demands of a social movement, and to assist in the political self-definition of that movement.").

[385] M. Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 162 (1988) (public values analysis lacks content).

[386] Eskridge, *Statutory Interpretation*, *supra* note 278, at 1091.

[387] *See* Kennedy & Minow, *supra* note 290, at 97 ("Respect for procedural rules is perhaps the purest form of respect for the Rule of Law . . . [which] demands that the players be given a chance to choose to obey the rules and to learn to play within them."). Kennedy and Minow suggest that Justice Marshall, although thoroughly dedicated to "pursuing social justice through law," appears to be committed to the independent value of procedure, so much so that he "would come to enforce procedural rules that preclude the outcomes demanded by substantive justice." *Id.* at 99.

My interpretation of their commentary is that Justice Marshall believes in the need for a sturdy procedural framework and in the duty of all litigators to master its intricacies and strategic potential. Justice Marshall's embrace of "proceduralism", however, with its occasionally harsh substantive results, is probably dependent upon the overall accessibility and fairness of the system for all who seek to use it, especially minorities. The Federal Rules, prior to efficiency procedural reform, were perceived by many as "generally fair" to minorities—that people outside the mainstream tended to be included rather than excluded from the system. *See* Weinstein, *supra* note 186. If the system, as restructured and implemented, disproportionately and adversely affects certain groups,

enervate as well as empower, recognizing that the process of rights assertion is dynamic with conflicting potential. Despite these complexities and contradictions, and in some ways in light of them, the view offered here suggests an essential procedural value of accessible courts for minorities; the value to which the other more specific procedural values are linked. Minority rights assertion enables minorities to use judicial power to gain entry into the polity without "relinquishing struggles over meaning and power."[388]

We especially care about the effects of procedural change upon minorities for that reason. A procedural system hospitable to minority claims at the margins facilitates not only the articulation of old rights in new contexts. It also facilitates the development of group power by encouraging the articulation and advocacy of new conceptions of rights responsive to the needs and aspirations of people unrecognized by the Constitution's framers and ignored by society's mainstream.

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especially those with little input into its creation and operation, the system may lack integrity to warrant support. For example, it is doubtful that Marshall would find a $1,000 filing fee acceptable even if all litigants were required to pay it, the rich as well as the poor. This returns us to our inquiry about the likely cumulative effects and overall fairness of recent procedural reforms.

[388] Minow, *Interpreting Rights*, *supra* note 300, at 1862.